IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE HELENA WATER WORKS CO.,

Appellant,

vs.

THE CITY OF HELENA,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Before proceeding to reply to the brief of appellant we desire to call the attention of the Court to some matters which were presented in the Circuit Court of Appeals by appellant.

This is a suit in equity brought by the appellant in its dual capacity as a corporation organized and existing under the laws of the State of New Jersey, and as a taxpayer of the State of Montana. The object of the suit is to enjoin the appellee, a municipal corporation existing under

the constitution and laws of the State of Montana, from constructing and maintaining a water plant of its own, for the purpose of supplying the city and its inhabitants with water. The complaint sets up the necessary facts, to sho wthat appellant was a taxpayer of the City of Helena and State of Montana, and entitled to seek such relief as is incident thereto. It also sets up Ordinance No. 248 of said city and makes it a part of its complaint, and alleges a compliance with its terms and conditions. Upon its right as a taxpayer, and its rights under said ordinance, it bases its suit, all of which will appear more fully by its said complaint and amendments thereto, on pages 1 and 23 of the record.

On the 13th day of May, 1901, appellee filed its demurrer to said complaint upon the grounds that it did not state facts entitling appellant to the relief sought, or any relief, and that it was altogether multifarious. This demurrer was, after argument, overruled, and exception duly taken to such ruling. See record, p. 25.

Thereupon appellee filed its answer to said bill of complaint and amendments thereto, and to which answer appellant filed its replication. See record, p. 29.

Upon the issues thus presented the parties to this appeal filed an agreed statement of facts upon which the trial was had. See record, p. 44.

And upon the foregoing record, the Court on the 21st day of August, A. D. 1902, rendered and entered its decree in favor of appellant and against appellee, by which it

was ordered and decreed that the injunction theretofore issued be made permanent, and appellee enjoined from acquiring, constructing and maintaining a water plant and supply for the purpose of furnishing the inhabitants of said city with water until the expiration of the franchise granted by Ordinance No. 248, and from said decree and the whole thereof this appeal is taken. See record, p. 129.

Before the signing of said decree and during the argument of the merits of the suit, appellee objected to any decree in favor of appellant, and especially to that portion thereof preventing the construction and completion of a water plant, at any time prior to the expiration of said franchise it should deem expedient to do so, and that said decree be limited to selling or disposing of water to the inhabitants of said city.—Which objections and request were overruled, said decree passed as presented and appellee's bill of exceptions signed, sealed and made a part of the record. See record, p. 130.

As the merits of this appeal depend almost, if not entirely upon the agreed statement of facts, for convenience we reproduce it here:

AGREEMENT UPON FACTS.

It is hereby stipulated and agreed between the parties to the above entitled suit, that the following statement of facts may be, and the same are hereby made the facts upon which the trial and determination of all of the questions and issues of law and facts shall be had and a final decree

thereupon entered, and that the same may be adopted by said Court as its findings herein for that and all purposes of said suit.

It is further stipulated and agreed that the facts herein agreed upon are limited and confined to this suit alone, and shall not be deemed as admissions upon the part of either party for any other purpose than hereinabove set forth; and that no legal deductions set forth in said bill of complaint shall be deemed admitted.

It is agreed that each and all the allegations contained in complainant's bill of complaint as amended, up to and including paragraph 20, are true and correct, except in so far as any legal deductions are stated and made therefrom; and the further fact that in the purchase of Beaver Creek Water the warrants issued in payment therefor have been paid, and said warrants were issued in exchange by said city for, and the deeds of conveyance for said waters were delivered to said city upon receipt of, said warrants; and that immediately after receiving said warrants, and delivering said deeds as aforesaid, said warrants were presented to the city treasurer on said 3d day of April, 1901, and immediately thereupon said city treasurer paid such warrants out of the cash on hand in the city treasury of said city derived from taxes levied and collected for general municipal and administrative purposes, and that it is now the legal owner and holder of the water so purchased.

II.

It is agreed that in the month of January, 1895, the defendant commenced the action and proceedings mentioned in paragraph 21 of complainant's bill of complaint, and that in such action and proceedings it was finally adjudged and determined as shown and disclosed by the pleadings herein, the judgment thereupon entered, and the opinion of the Court, all of which is made a part of this agreed statement of facts, and are hereto attached; and that said judgment is in full force and unreversed.

III.

That the indebtedness of the defendant is now and has been for several years last past, in excess of three per cent (3 per cent) of the assessed value of all the taxable property in said city, as determined by the assessment for the state and county taxes, during each and all of said years. That said indebtedness is now, and has been for several years last past, in excess of the sum of four hundred and eighty-six thousand dollars ($486,000), and that the value of the taxable property during all of said times in said city, as determined by the assessment for the state and county taxes for each of said years, does not and has not exceeded the sum of thirteen million dollars ($13,000,000), and that no election has ever been held by the said defendant, the City of Helena, at which either the question of issuing bonds or contracting an indebtedness for a

water plant, water system and water supply, to be owned and controlled by said city, has been submitted to the qualified electors thereof, and that no other objection upon which proceedings to allow a water plant and supply are based, has been had, except as hereinafter stated.

IV.

That said defendant, the City of Helena, has never given the complainant notice that it desired to purchase its plant, franchise or water supply, and that no effort has ever been made by the said defendant to agree with complainant upon the terms of such a purchase to acquire the plant and water supply of complainant, except as hereinafter stated in paragraph VIII, and as follows:

That during the months of September and October, 1899, pursuant to an order of the city council of said defendant city, defendant advertised for sealed proposals in the "Helena Daily Independent," a daily newspaper of general circulation in said city and state; and in the "American Contractor," a weekly publication of general circulation in the City of Chicago, State of Illinois, and throughout the United States, for sealed proposals for the "construction and purchase of a water plant and supply," in accordance with certain plans and specifications theretofore adopted by said city council, said proposals to be opened on November 6th, 1899. That said plans and specifications expressly stated therein and contained the following: "It is expressly understood that nothing

herein contained shall prevent any company now operating a water plant in the city, or any other company or individual from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed, upon a plan different from that herein specified, but any such company or individual may submit any bid that it or he may desire, upon any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received." And that in response to said advertisement, a proposition was received from complainant herein, through Edgerly and Crocker, by Francis M. Edwards, their agent, offering to sell to defendant the water plant and system of complainant herein for the sum of nine hundred and ninety thousand dollars ($990,000). That at the time of receipt of said proposition by complainant, and the opening of bids by said city, to-wit: November 6th, 1899, the limit of indebtedness over and above the three per cent (3 per ct.) limit fixed by the constitution had not yet been extended, and that thereafter, to-wit: at an election of the taxpayers affected thereby, of said City of Helena, held on the 4th day of December, 1899, pursuant to an ordinance in that behalf, duly passed and approved, the question was submitted to said taxpayers affected thereby, whether the limit of indebtedness should be extended ten per cent (10 per ct.) over and above said three per cent (3 per ct.) limit, for the purpose of procuring a water supply and system to be owned and controlled by said defendant, and which

should devote the revenues derived therefrom to the payment of the debt incurred therefor; the last assessed valuation of said city thretofore for state and county taxes being the sum of ten million, seven hundred and forty thousand ($10,740,000) dollars; but that the majority of the taxpayers affected thereby, voting at said election voted "No," and against said proposed extension of ten per cent (10 per ct.), and that as a result thereof, the city council of said defendant was obliged to and did reject said bid and all others received.

That thereafter an election was held on the 18th day of January, 1900, as alleged in the complaint, at which the majority of the taxpayers affected thereby, of said city, voted "Yes," and in favor of extending the limit of indebtedness of said city five per cent (5 per ct.), or in amount six hundred and fourteen thousand, four hundred and seventy-five dollars and fifty cents ($614,475.50), over and above the three per cent (3 per ct.) limit, for the purpose of procuring a water supply and system to be owned and controlled by said city, and which should devote the revenue derived therefrom to the payment of the debt incurred therefor; and thereafter, on the 4th day of June, 1900, by Ordinance No. 477, duly passed by the city council of said defendant, and approved by the mayor on said date, said limit of indebtedness was, in accordance with said vote at said election, duly extended five per centum (5 per ct.) over and above the three per cent. (3 per ct.) limit provided by Section 6 of Article XIII of the consti-

tution of the State of Montana, of the total assessed valuation of the taxable property of said city, as ascertained by the last assessment theretofore for the state and county taxes, to-wit: five per cent. (5 per ct.) of $13,287,510.00, namely, $614,475.50 over and above said limit of three per cent. (3 per ct.), for the purpose of procuring a water system and supply for said city, which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and that thereafter said defendant, in that behalf by the city council of said city duly authorized, commencing on the 7th day of June, 1900, and ending on the 20th day of June, 1900, advertised daily for sealed proposals, in the said "Helena Daily Independent" for a "water supply," and also for a "water supply and system," to be owned and controlled by said city, in accordance with certain plans and specifications therein referred to and theretofore adopted by the city council of said city, said proposals to be opened on June 25, 1900, at the regular meeting of the city council on said date. That said plans and specifications in said advertisement referred to were as hereinbefore stated. But that no bid or proposal or response of any kind whatsoever to said advertisement was made by complainant herein or by said defendant received from complainant in response thereto.

V.

That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellan or Prickly Pear Creeks.

VI.

That the Ordinances Nos. 467 and 483, mentioned in paragraph 27 of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, the City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose, as hereinbefore stated, and will engage in furnishing the said defendant, the City of Helena, and its inhabitants, with water, suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property, as stated in paragraph 28 of the complaint, but

that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it.

VII.

That the facts stated in paragraphs 29, 30 and 31 of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage, or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, the City of Helena.

VIII.

It is also agreed that at an election held at said city on the 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof, by the legal voters of said city. That thereafter the city council of said city, by resolution duly passed, directed the city clerk to advertise for bids for a supply of water, to be furnished, owned and controlled by said city, in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters, as hereinabove in paragraph IV stated. That

on the 14th day of December, A. D. 1895, The Helena Consolidated Water Company, predecessor in interest of complainant, commenced its action in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, by which it sought to enjoin the defendant from advertising and receiving bids for said purposes, and to which complaint, defendant, the City of Helena, duly filed its answer; that a restraining order was duly issued, and an appeal therefrom duly taken to the Supreme Court of the State, and by that Court the said judgment so appealed from was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreversed, and a copy of the pleadings, order for injunction, appeal, judgment and opinion of the Supreme Court are hereto attached and admitted with all the force and effect to which the same may be and are entitled.

IX.

That said defendant City of Helena has made no other efforts under the allegations of paragraph 24 of said complaint, than as herein set forth, and that it proposes and intends to construct and establish a water plant and system, to be owned and possessed by it, prior to the

expiration of the alleged contract and franchise of complainant, at such time as in its judgment and discretion it is feasible and proper so to do, and all actions and proceedings necessary therefor instituted and maintained, and that unless enjoined and restrained from so doing it will, both before and after the expiration of said alleged contract and franchise, furnish and supply the said city and the inhabitants thereof with water. That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended, in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so, on account of the facts and admissions hereinbefore stated and made.

X.

And it is further agreed that said Ordinance No. 248 is in full force and effect, except in so far as it is or may be affected or modified by the ordinances or resolutions aforesaid.

XI.

And it is also further agreed that all the allegations in the said complainant's bill of complaint, alleged and not denied in the answer of defendant, be and the same are admitted as agreed facts, save and except the legal

inferences and conclusions drawn therefrom by the pleader; and that all denials inconsistent with the facts herein agreed upon be and the same are hereby withdrawn; and said pleadings are made and construed to conform to the facts herein agreed upon.

ASSIGNMENT OF ERRORS.

I.

Appellant has no status or rights, as a taxpayer, to maintain this suit under the pleadings and agreed statement of facts.

II.

It has no rights which have been or will be violated, by the alleged wrongful acts, under the agreed statement of facts, and is not entitled to the relief granted or any relief. There is no obligation, expressed or implied, by which appellee is estopped, in law or equity, from putting in a water plant of its own, or by operating and maintaining the same under Ordinance 248 or otherwise, nor has appellant or will appellant sustain any lawful damages on account thereof, by reason of which the Court erred in rendering the decree herein.

III.

The record shows that appellant, as successor by purchase, of said water plant and franchise, is estopped by the former judgment, in the case of the Helena Consolidated Water Company vs. William L. Steele et al., from asserting its alleged claim in this suit, and that the judgment therein rendered against the predecessors in interest of appellant is conclusive of any and all rights it has to maintain this suit, and that it is bound by the interpretation of said ordinance so made by the court in said action, and was and is not entitled to the decree rendered, and that the court erred in rendering the same.

IV.

The trial court has no jurisdiction herein on account of the pendency of the actions to condemn, or to grant an injunction by which the state court in which the actions were pending is restrained from further proceeding therein, and it erred in holding that it had.

V.

The court erred in not modifying the decree as requested and in passing the same against the objections of appellee, as will appear by its request and bill of exceptions, for that it interfered with the discretion and business functions of the city, and is in direct violation of a reserved right under the ordinance.

VI.

The court erred in overruling appellee's demurrer to appellant's bill of complaint.

VII.

There is manifest error in rendering any decree or granting and injunction in favor of appellant, for that it appears from the pleadings, agreed statement of facts and exhibits, that as a matter of law no right of appellant was violated, or threatened to be violated by appellee, and that appellee was and is entitled to construct and maintain said water plant and use the public streets, alleys and grounds therefor, and because there was no obligation expressed or implied by which appellee was or is estopped from performing the acts complained of.

VIII.

And the court also erred for the additional reasons set out on pages 132 to 134 inclusive, in the record herein.

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ARGUMENT.

We shall discuss the propositions involved, in the order in which they are presented in the assignment of errors by this brief. They are so arranged that the two principal and controlling questions under the *complaint* and agreed statement of facts, are first in order. If these propositions are maintained in favor of appellee, it is quite manifest that no further consideration of errors assigned in the record is necessary. These two propositions deny that appellant has any status as a taxpayer, or any rights, under Ordinance No. 248, that enable it to maintains this suit. If neither of these give to appellant the compulsory process and relief demanded, it has no cause for complaint and its bill should be dismissed.

I.

NO RIGHT TO RELIEF AS A TAXPAYER.

This suit is commenced and prosecuted by appellant, in its dual capacity as a taxpayer and as owner of the franchise granted under Ordinance 248. It bases its claim to relief as a taxpayer upon the proposed illegal expenditure of public moneys by appellee. The allegations of the bill, and upon which appellant must rely, specifies the following facts, upon which it relies:

First—The intended misappropriation of such moneys in the purchase of the water of Beaver Creek.

Second—The unlawful expenditure contemplated in constructing and maintaining a water plant of its own.

Upon the first point, it will be observed that under paragraph I of the agreed statement of facts, it is stipulated "That in the purchase of Beaver Creek water, the warrants issued in payment thereof have been paid, and said warrants were issued in exchange by said city for, and the deeds of conveyance for said waters were delivered to said city upon receipt of said warrants and delivering said deeds as aforesaid, said warrants were presented to the city treasurer on said 3d day of April, 1901, and immediately thereupon said city paid said warrants out of the cash on hand in the city treasury of said city derived from taxes levied and collected for general municipal and administrative purposes, and that it is now the legal owner and holder of the water so purchased."

We shall not stop to argue this past and completed transaction had passed beyond the reach of the injunction sought, or any relief that might be granted under the bill. The state has instituted no proceeding to set it aside, and the object of this suit is not for the purpose of preventing the collection of taxes to reimburse the fund from which the expenditure was made. So that the legality or illegality of the expenditure is of no consequence, being a completed transaction, and no proceeding commenced by which the rights of the parties can be disturbed and the deeds and payment set aside. It is enough to say that the remedy sought and available in this suit is preventive and cannot reinstate the parties to their original condition. This seems to be a complete answer to the bill on

account of the expenditure made for the water of Beaver Creek. It certainly presents no grounds for preventing appellee from constructing and maintaining a water plant of its own, for the purpose of supplying the city and its inhabitants with water.

The second point, concerning the contemplated expenditure of money, and its alleged misappropriation on account of the present indebtedness of the city, and unlawful attempt to construct and maintain a plant of its own, it must be conceded and probably will be, that unless the appellee on account of its obligations under the ordinances is not authorized to put in and maintain the plant, there is nothing in its claim on that account. Unless the right of appellee is taken away by the ordinance, the present indebtedness is of no consequence, as the fund to be raised for that purpose is independent of and in no way connected with or affected by such indebtedness. So it will be seen that, aside from any question of indebtedness, under the constitution and statutes we hereafter quote, a lawful fund to inauguarate and operate a plant to supply the city and its inhabitants with water can be lawfully raised and used for that purpose regardless of the present condition of its indebtedness. Hence so far as appellant's rights as a taxpayer is concerned, it must arise on account of some attempt to unlawfully raise and apply funds. If the acts of appellant as a taxpayer has will not result in the misappropriation of the fund, it would seem in all reason that appellee as a taxpayer has

no right to complain. Indeed it may well be said that if by reason of any contractual rights it has under the ordinance, this expenditure cannot lawfully be made, its remedy lies in the individual enforcement of those rights and not in its character as a taxpayer. This question, however, is met in any and all of its phases by the stipulation upon which the rights of the parties depend.

Concerning the proceedings of appellee and the raising of funds and revenues to install and operate its plant, and the damage or injury that might ensue to appellant as a taxpayer on account of it, the agreed statement of facts show that no misappropriation is intended or to be made, but on the contrary, the same is to be *in conformity with the law*, and not in violation of it.

Paragraph V, record, p. 47, reads:

"That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose; and that complainant does not obtain any of its water supply from either Beaver, McCellan or Prickly Pear Creeks."

As to his damage and injury as a taxpayer, paragraph VII, p. 48, of record reads: "That the facts stated in paragraphs XXIX, XXX and XXXI of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, the City of Helena.

That portion of paragraph IX, p. 48, of record, concerning the raising of revenue, to construct and maintain its plant, and in which plaintiff as a taxpayer is in any way interested, reads:

"That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so account of the facts and admissions hereinbefore stated and made."

The constitutional provision under which appellee is constructing its water plant, and the means of raising money therefor, reads, Article XIII, Section 6:

"No city, town, township or school district shall be

allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district, shall be void; *Provided, however,* that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

That portion of the statute enacted under the foregoing constitutional provision, and under which according to the agreed statement of facts appellee is proceeding to construct its plant and raise money therefor, approved March 8, 1897, and containing what is known as the rider, reads, Section 4800,—The city or town council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, brides, waterworks, lighting plants, supplying the city or town with

water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes; provided, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referrd to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and, provided further, that the above limit

of three per centum shall not be extended, unless the question shall have been submitted to a vote of the tax payers affected thereby and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election. It is further provided, that whenever a franchise has been granted to, or a contract made with, any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemna-

tion proceedings. For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation or otherwise.

"Cities and towns shall have jurisdiction and control over the territory occupied by their public works and over and along the line of reservoirs, streams, trenches, pipes, drains, and other appurtenances used in the construction and operation of such works and also over the source or stream from which water is taken for the enforcement of its sanitary ordinance, the abatement of nuisances, and the general preservation of the purity of its water supply, with power to enact all ordinances and regulations necessary to carry the powers hereby conferred into effect. For this purpose the city or town shall be authorized to condemn private property in the manner provided by law, and shall have authority to levy a just and equitable tax on all consumers of water for the purpose of defraying the expenses of its procurement."

We have quoted these provisions of the constitution and statutes, not that they are material in so far as appellant's claim as a taxpayer is concerned, as the agreed statement of facts admits that the proceeding to raise the revenue is in accordance with the constitution and laws,

but for the reason that it will be necessary to refer to it later on in this brief.

It is respectfully submitted that in so far as appellant's claim as a taxpayer is concerned, it cannot be maintained, and that any and all rights it has depends upon its contract under Ordinance 248, and the judgment pleaded by appellee as an estoppel.

II.

Rights of Appellant Under Ordinance 248.

It is quite apparent that the injunction sought and granted herein is but a means employed of enforcing the contractual rights of appellant, if it has any, under Ordinance 248. That is to say, if there is an obligation on the part of appellee not to put in a plant of its own and to take water of appellant, expressed or perhaps *necessarily* implied *from what is expressed*, and it is *certain, fair* and *reasonable,* specific performance will be enforced by injunction and appellant's rights to the extent of such obligation in that mode preserved.

To authorize the specific performance of a contract, the uniform rule seems to be, that it must be certain in its terms and mutual in its obligations. We shall undertake, and expect to be able to show to the Court, that under the express terms of the contract or ordinance, appellant is under no obligation to take water for its own use, or use of its inhabitants, and cannot be compelled to do so against its wishes. That is to say, that instead of obligating itself

to take the water of appellant upon which its right to an injunction depends, it has expressly provided against such obligation. That in consideration of the *franchise,* appellee has obligated itself to furnish pure and wholesome water during its existence, if the city and its inhabitants desired to take it, but that there was no corresponding obligation upon appellee to take it. We do not presume it will be contended, and it certainly cannot be successfully contended that it is of any consequence to the appellant how appellee obtains its supply of water, so long as it is under no binding obligation to take of it. In other words, there can be no breach of a contract in that respect, when none exists and no damage can accrue, by a refusal to take it, without any obligation to do so. As we shall see hereafter, appellant's right to enjoin appellee depends upon appellee's obligation to take water of it.

We shall assume as a fact, that under the organic law of Montana as a territory and its constitution as a state, neither the legislative assembly nor any municipality created by it or under its authority had or has power to grant to any corporation any special or exclusive privilege or franchise. There is then, to this extent, such a limitation of power as to forbid and construction of the ordinance that would, in substance and effect, operate as a special or exclusive privilege or franchise under Ordinance 248.

Proceeding now to determine the construction to be given Ordinance 248, as to the obligation of appellee to

take water of appellee for the city and its inhabitants, the cannon of interpretation declared by the statutes in force at the time of its passage should obtain and govern. Section 630 of the Compiled Statutes of Montana, in force at the time of the adoption of the contract or ordinance, and similar to that now in force, reads: "In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein—not to *insert* what has been *omitted*, or to *omit* what has been *inserted*, and where there are several provisions or particulars, such a construction is, *if possible*, to be adopted as *will give effect to all.*"

Section 633 of the same statute and similar to that now in force, reads: "The terms of a writing are presumed to have been used in their primary and general acceptation * * *"

Section 631, like our present statute, reads: "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties to is to be pursued, if possible: and when a *general* and *particular* provision are inconsistent, the latter is paramount to the *former*. So a *particular* intent will control a *general* one, that is inconsistent with it."

Section 1 of ordinance 248, upon which this whole contention rests, as we shall hereafter see, reads:

"There is hereby granted to the Helena Consolidated Wated Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the

license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the City of Helena, for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city *desiring* to purchase the same and to said city for fire, sewerage and other purposes, in case said city *desires* to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city, *if required;* provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as herinafter set forth."

This section of the ordinance gives the appellant the right to sell water at the maximum rates for twenty years, i. e., during the franchise, but it nowhere obligates appellee to purchase it during any portion of said period. On the contrary it *expressly* provides that appellee shall not be required to purchase it, to supply the city or its inhabi-

tants, unless it desires to do so. To assume that under such conditions, *because appellee had heretofore* purchased water and the inhabitants had done likewise, that they are required to continue it against their will, is too absurd and illogical to demand serious consideration.

Hence, under the cannon of interpretation declared by law, which is but an adoption of the general rule, the word *desire* cannot be omitted. Besides being a special and particular provision, with reference to the *obligation to purchase,* and showing a particular *intent,* it controls all general provisions and general intention that might otherwise be implied under the ordinance. We call especial attention to this, as we shall contend that it is conclusive of the merits of this contention under the decision of the Supreme Court of the United States in Skeneateles & Co. vs. The Skeneateles, 184 U. S., 354, quite recently decided.

Under the statutory rule of construction we nowhere find any provision of the ordinance that conflicts with Section 1 in this matter or that cannot *possibly* be reconciled with it. Indeed it may be fairly said that construed together they are in perfect harmony. The only section referring to this matter are confined to the duty and obligation of appellant on account of its franchise and do not change or attempt to change the obligation of appellee with respect to purchasing the water. The only sections that can possibly have any bearing upon this matter are

sections 6, 15 and 26, which we shall consider in the order stated. Section 6 is as follows:

"The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of said city, as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use."

In all reason it cannot be claimed that this section is repugnant to, and impossible to reconcile with section 1. It nowhere imposes or attempts to impose any obligation upon appellee to purchase the water. It only defines the obligation of appellant on account of its franchise, and harmonizes in all respect with the express provision of Section 1, by which appellee is not to purchase water during the existence of the franchise unless it so desires. The only possible conflict or repugnancy lies in limiting the obligation of appellant to five years, while the other provisions fix it at twenty, and no rational person will contend that it in any way modifies, changes or affects the express provision we have mentioned, or even relates

to it. In connection with Section 21 it might be construed to impliedly obligate the city to purchase the water "during the full term of five years from and after the 20th of January, 1890." As that period has long since passed the question does not figure in the present contention.

"The said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed, in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants included in the contract between the said city of Helena and the Helena Water Company and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890."

It is equally plain and manifest that this section in no way affects or relates to the obligation of appellee expressed in Section 1. It refers solely to the obligation of appellant to furnish water during the *construction* period, and defines when the plant is to be completed. It leaves the express agreement of Section 1, that appellee for itself and its inhabitants shall not be required to purchase the water during the twenty years, contained in Section 1, and five years mentioned in Section 6, entirely untouched.

Section 26 reads: "It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof, that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of god, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

This section, instead of being repugnant and irreconcilable with the express provision discussed, in Section 1, fortifies and sustains our position that the very essence of the agreement was the furnishing of water in consideration of the twenty years' franchise. It not only has no reference or bearing upon appellee's obligation to take or purchase water of appellant, but on the contrary, in emphatic terms says that the water supplied and distributed shall be "upon the terms and conditions herein expressed," one of which is that appellee shall not be required to purchase or take the water unless it desires to do so. We look in vain for any modification or change of the obligation incurred by appellee, and respectfully submit that it is a great and serious wrong and injustice to construe such obligation to exist.

In this connection we desire to take up the Skaneateles case heretofore referred to, and apply the doctrine there announced to the conditions existing in the present suit.

While we do not concede it to be the law, yet for the purposes of this argument on this point, we shall assume that the appellee had the power to contract to take and purchase water of appellant to supply the city and its inhabitants with water for the full period of twenty years, had it seen proper to do so. The main and controlling question under this head is, can the appellee be enjoined from acquiring water elsewhere, in any lawful manner, in the absence of any obligation not to do so, and in the very face of an express provision in the ordinance, unassailed and unassailable, that it shall not be required to take or purchase water of appellant unless it desires to do so, *i. e.*, under a bare option to take and purchase it.

We here for convenience quote from the statement of the facts, made by Mr. Justice Peckham in the Skaneateles case:

"The action was brought by the water company to restrain the village of Skaneateles and the individual defendants, its officers, from proceeding further with the construction of a waterworks system, or from doing anything in furtherance of the construction or operation of any system of waterworks for that village. The plaintiff claimed that the village ordinance under which the proposed action on the part of the village was taken was void as impairing the obligation of a contract between plaintiff and the village; also, that its action if continued would result in the taking of plaintiff's property without due process of law; that the action of the defendant, if per-

mitted, would result in the taking of private property for public use without compensation; and that such legislation denied to plaintiff the equal protection of the laws.

"The defendants answered denying the contentions of plaintiff, and the case was referred to a referee for trial, who, after hearing the parties, reported that the defendants were entitled to judgment, dismissing the complaint upon the merits, with costs, and judgment was thereupon entered, which was affirmed by the appellate division of the Supreme Court of the State and upon appeal by the Court of Appeals."

The law as originally enacted, and considered in the Skaneateles case, it is true, did not expressly provide, as ordinance 248 does, that the water company shall at all times furnish the city and inhabitants with water. Whether such failure to so provide would release the company from furnishing water on account of its business or franchise is unimportant here. It is enough to know that under the amendment to the law the water company "shall supply the authorities or inhabitants of any town or village * * through which the conduits or mains of such corporation may pass, with pure and wholesome water at reasonable rates and costs," and yet under this provision there was no implied obligation on the part of the village to take and purchase the water, and for that reason the village should not be enjoined from bringing in and operating a plant of its own. What shall be said, then, in the case in hand, where by express provisions of

the ordinance, appellee is not required to take or pay for the water unless it desires to do so?

Will an implied obligation be inferred in this case and an injunction issued, when it was denied in the Skaneateles case, and affirmed by the decision of the Supreme Court? Lacking, then, in every element of trespass or wrong upon the franchise rights of appellant, and there being no obligation to take or pay for the water under ordinance 248, we respectfully insist that the decree should be reversed and the trial court directed to dismiss appellant's bill.

It was not denied upon the trial, and we take it will not be here, but that the appellee before the passage of ordinance 248 had the right to bring in its own plant, but the point is that by ordinance 248 it is disabled from so doing. The conditions are exactly analogous, and the Supreme Court of the United States in the Skaneateles case (184 U. S., 362, 363) uses this language:

"Having before it the above act of 1873, amended in 1877, the Court of Appeals, in *People ex rel. etc. v. Forrest and others,* 97 N. Y. 97, 100, decided in 1884, said that:—'The State authorized the formation of waterworks companies in its town and villages (Laws of 1877, chap. 171), but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed.'

"It is true that by chapter 566 of the laws of 1890 it

was provided that the water companies "shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, with pure and wholesome water at reasonable rates and cost;" and the act provided that contracts might be made therefor. But there was no provision making it incumbent upon the municipal authorities to take water from any such company.

"By virtue of its incorporation under this act of 1873 the plaintiff secured simply the right to be a corporation and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles. The village, however, as stated, was under no obligation to take water from the company. That was a matter for subsequent contract between the parties. Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, after the termination of the contract the plaintiff and defendant were empowered to make, there should be no right in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff.

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible

consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

We respectfully submit that the gravamen of the decision is, that there being no obligation in the franchise to take and purchase the water, there could be no damage or injury in a legal or equitable sense, and the village should not on that account be enjoined from bringing in and maintaining its own water plant. In the case before the Court for determination no element of estoppel obtains to prevent appellee from installing its own plant as it proposes to do and is doing, in accordance with the constitution and laws of Montana.

Again, there being no express surrender of the public right of appellee to put in its own plant, but on the contrary, language used which expressly reserves it, how can any obligation be implied by which this right has passed and appellee compelled to desist from bringing in its own plant? Even in cases where such an implied obligation can possibly be created, the rule is declared in emphatic terms in the following cases:

Sedgwick, Statutory and Constitutional Law, page 338, lays down the following doctrine:

"We have seen that the Civil Law inclined to consider grants made by the sovereign with a favorable eye, and to give them an enlarged and liberal interpretation. The Common Law, however, in obedience with its instruc-

tive sympathy with equal rights and its jealousy of prerogative, has always adopted a widely different and much sounder rule. The uniform language of the English and American law is that all grants of privilege are to be liberally construed in favor of the public, and as against the grantees of the monoply, franchise or charter to be strictly interpreted. Whatever is not unequivocally granted is taken to be withheld; all acts of incorporation and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies."

In Charles River Bridge Co. vs. Warren Bridge Co., 11 Peters, 507, Chief Justice Taney, speaking for the Court, says:

"The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. * * * The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power

then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or *any other affecting the public interest*, the same principle applies, and the rule of construction must be the same."

And Mr. Justice Clifford, in speaking of the above decision in the case of ...ce vs. Railroad Co., 1 Black, 358, 380, says:

"Most of the cases bearing upon the point previously decided were carefully reviewed on that occasion, and, consequently, it is not necessary to refer to them. Judge Story dissented from the views of the majority of the judges, but the opinion of the court has since that time been constantly followed. Later decisions of this court regard the rule as settled that public grants are to be construed strictly and that *nothing passes by implication.* That rule was applied in the case of Mills et al. vs. St. Clair Co. (8 How., 561), and the court say that the rule is, that if the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. Any ambiguity in the terms of the contract, say the court in the case of Richmond R. R. Co. vs. Louisa. R. R. Co. (13 How., 81), must operate against the corporation and in

favor of the public, and the corporation can claim nothing but what is given by the act.—Perrine vs. Chesapeake Canal Co. (9 How., 192). Taken together these several cases may be regarded as establishing the general doctrine that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and express terms. (Ohio Life and Trust Co. vs. Debolt, 16 How., 435; Com. vs. The Erie & N. W. R. R. Co., 27 Pa., 339; Stourbridge vs. Wheeley, 2 Barn. and Ad., 792; Parker vs. Great Western Ry. Co., 7 M. and Gr., 253.)"

In Leavenworth, etc., Ry. Co. vs. U. S., 92 U. S., 733, the Court uses this language:

"The difference would seem to imply obscurity in the act; but be this as it may, the rules which govern the interpretation of legislative grants are so well settled by the Court, that they hardly need be reasserted. They apply as well to grants of lands to states to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to undertake."

In Slidell vs. Grandjean, 111 U. S., 412, 437, Mr. Justice Field, speaking for the Court, says:

"It is also a familiar rule of construction that where

a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of the terms, or as to the general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this Court in many instances in the construction of statutes of this description. (Authorities). The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies."

Barden vs. N. P. R. R. Co., 45 Fed., 609; 154 U. S., 288.

As we have seen, Section 1 of Ordinance 248, contains the *only* provision concerning the obligation of appellee to take and purchase the water of appellant, and upon which the right to enjoin rests. Under it appellee has expressly reserved the right to not take and pay for the water unless it desires to, and it is nevertheless insisted in the very face of it, that there is an implied unqualified obligation to do so. To raise such an implication is illogical and contradictory under the language used and the

authorities we have quoted. It would be converting a bare option to take, into an absolute obligation, against the *desire* of the party against which it is to be enforced, a direct violation of the obligation of the contract.

The record shows that appellee has no other facilities of obtaining water at present except from appellant, and it defiantly says to appellee, notwithstanding you are under no obligation to purchase water from us, and have expressly reserved the right not to take or purchase it, we will coerce you by injunction from putting in a plant of your own and thereby destroy the provision made for your protection.

If the right not to take water of appellant exists in appellee, the puny quibble as to whether appellee will get it by a plant of its own, or take chances in some other company or individual doing it for them, is too diminutive a resort to control the important and valuable rights involved in this contention. Not being required to take it of appellant it is none of appellant's business, to speak plainly, how appellee obtains it, if lawfully and appropriately done. The record shows that appellee is not even seeking to take water from the streams from which appellant obtains its water, and this is all that should concern it. The plea of estoppel in such cases is as empty as the wind. Appellee has never conceded away its right to bring in and maintain its own plant. Its consent must be obtained before this can be done. Appellant comes into a court of equity and asks to compel this consent in

violation of Section 2120 of the Civil Code, "In taking a grossly oppressive and unfair advantage of another's necessities or distresses." It is seeking indirectly to compel appellee to take the water against *its wishes* and *desires* as manifested by this proceeding. Appellant's hands are not clean.

If the Skaneateles case covers the controlling question, we doubt the propriety of arraying authorities pro and con or attempting to distinguish between them, as the Supreme Court of the United States will be presumed to have done this, and we hesitate in pursuing this question further. Keeping in view the distinction between cases where the matter involved in the invasion of the rights granted under the franchise and the construction of the obligation to be performed by appellee, the decision from which we have quoted seems to stand upon impregnable grounds. While we hesitate to pursue this question further, we deem it proper if not necessary to call the attention of the Court to some authorities in support of the last decision cited.

The law secures to appellee, as we have seen, the right to put in its own plant, and the question is, has it granted away this right.

The mutual and depending conditions under the ordinance are, the right to use the streets and alleys to maintain the system and the right to sell the city and inhabitants water, *provided they desire* to purchase it, at specified rates. It expressly also reserves the right to the

occupancy of the streets, avenues, alleys and public grounds with water mains and pipes and denies the exclusive right to sell and distribute water to the city and its inhabitants.

This Court, in Wright vs. Nagle, 101 U. S., 791, cited in Walla Walla vs. Walla Walla Water Company, supra, p. 18, thus speak of a case reviewed in the opinion in the former case: "The language of the Court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case."

That the case now before the Court is "another and different case" upon the facts from that presented in Walla Walla vs. Walla Walla Water Company, supra, has already been pointed out, and is manifest from even a casual examination. And that other courts in citing and commenting on the Walla Walla case are mindful that the scope of that decision is limited to the questions actually under consideration in that case is equally clear. Thus in Bienville Water Supply Co. vs. City of Mobile, 95 Fed., 539, 543, the Court says:

"An ordinance was passed by the city council (of Walla Walla) and accepted by the water company, granting to such company, for a term of twenty-five years, the right to lay mains and pies in all the streets of the city, for the purpose of furnishing the inhabitants thereof with water, and entering into a contract with the company for

the same term, by which the city agreed to pay certain rentals, and bound itself not to erect, maintain or become interested in waterworks unless the contract should be avoided by the judgment of a court of competent jurisdiction on the ground of a substantial failure of performance by the company. The language of the contract is that, 'until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any waterworks.' The water company substantially complied with the terms and conditions of the contract, which was still in force at the time the bill was filed. After this contract had been in force, and the stipulated rentals paid, for about six years, an ordinance was passed to provide for the construction of a waterworks for the purpose of supplying the city and its inhabitants with water, and to issue bonds to provide the necessary funds. The Supreme Court said, in substance, that the contract amounts to this: If the city should desire to establish waterworks of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable, but that it would not enter into a direct competition with the company during the life of the contract; that, so long as the contract had not been avoided by a court of competent jurisdiction, as provided in the contract, but remained in force, the city had no right to establish waterworks, because it had so covenanted with the water company, and the injunction was sustained."

"Thus we have seen that the contract, in every case to which our attention has been called, either provide for an *exclusive* right in the water company to supply water to the city and its inhabitants, granted or contracted for by the city, or *contained a covenant by the city that it would not* erect waterworks of its own, and would abstain from granting the right to do so to a competing company during the life of the contract. We have seen that the contract under consideration in this case contains no such stipulation or agreement. We have seen that it does not attempt to grant any exclusive right to the complainant, and that it contains no provision that the complainant shall furnish water to the inhabitants of the City of Mobile, and no covenant by the city that it will not build or acquire waterworks of its own, or abstain from supplying water to its inhabitants, during the continuance of the contract. The parties might have made such a contract but they did not do so."

This case was affirmed on appeal to the Supreme Court of the United States, 175 U. S., 110.

In Iron Mountain R. Co. vs. City of Memphis, 96 Fed., 113, the Court thus speaks of the Walla Walla case:

"The water company filed a bill to enjoin the City of Walla Walla and its officers from erecting waterworks in pursuance of an ordinance of the city to that effect. The water company had a contract with the city by which the city stipulated that during the terms of its contract it should not erect, maintain, or become interested in any

waterworks, except the one provided for in the contract, which it was given power to condemn. Subsequently the city passed an ordinance for the erection of new waterworks, and the question was whether that was a law impairing the obligation of a contract such as to give a federal court jurisdiction to enjoin its enforcement."

* * * * * * * * *

"In the Walla Walla case, cited above, it is difficult to see in whatrespect the ordinance of the city directing the construction of waterworks impaired the obligation of the prior exclusive grant, except in that it was an express breach of the covenant of the city in the grant that the city would not construct waterworks of its own, but would buy those of the grantee."

In University vs. Village of Canandaigua, 96 Fed., 449, 452, 453, the Court said:

"In the Walla Walla case, 172 U. S., 1, there was an *express* agreement on the part of the city not to build waterworks of its own during a period of twenty-five years,—the terms of the contract. The provision being that, while the contract was in force, 'the City of Walla Walla shall not erect, maintain, or become interested in any waterworks except the ones herein referred to.' The court decided that this stipulation was not ultra vires and that it was a palpable violation of its provisions for the city to construct a system of waterworks of its own while its contract with the company had nineteen years to run.

If the village of Canandaigua had covenanted with the water works company that in no event would it erect waterworks of its own until after the year 1909 the two cases would be analogous."

In Little Falls Electric & Water Co. vs. City of Little Falls, 102 Fed., 667-8, the Court says:

"As to the showing to the effect that the City of Little Falls is taking steps to construct a plant for the supply of water and electric light, it appears that the complainant's franchises are not exclusive, and that there was not, as in the Walla Walla case, above cited, any contract on the part of the city that it would not, during the term for which the franchises were granted, erect, maintain or become interested in other like works."

See also—

North Springs Water Co. vs. Tacoma, 47 L. R. A., 214.

Thompson Houston Electric Co. vs. Newton, 42 Fed., 723.

State vs. Hamilton, 47 Ohio St., 52.

Hamilton Gas L. & Coke Co. vs. Hamilton City, 146 U. S., 258.

Long vs. Duluth, 49 Minn., 280.

Westerly Water Works Co. vs. Westerly, 80 Fed., 611.

Skaneateles Water Works Co. vs. Skaneateles, 161 N. Y., 154; 46 L. R. A., 687.

We submit that neither the facts presented, nor the language used in the Walla Walla case, can be said to sustain complainant's claim that the appellee in this case agreed not to erect water works of its own.

There is another and graver objection to the claim now made that this appellee when it granted to complainant the franchise under which it now exists, by necessary implication covenanted with complainant not to erect or become interested in water works of its own during the life of said franchise. It can hardly be questioned but that when this appellee granted complainant the franchise contained in ordinance No. 248, it acted as the agent of the State in granting a franchise vested in the State.

Walla Walla case, 172 U. S., 1.

New Orleans Water Works Co. vs. Rivers, 115 U. S., 680, 681.

And in the construction of all such grants and franchises the rule is well settled that the grant or privilege must be clearly conferred and that all doubts and implications will be resolved against the grant or privilege claimed and in favor of the grantor. Thus in the case of Bartholomew vs. City of Austin, 85 Fed., 359, a case in its essential features much like the present, the Court said:

"The contract on which this action is based is a grant and privilege for a period of twenty years to the City Water Company to supply water to the City of Austin, and the inhabitants thereof, with the right of extension under certain named contingencies. The grant is not in terms an exclusive one, and, so far as the language used is concerned, there is nothing to hinder the City of Austin from erecting other and competing works, nor from granting to others the right to use the streets, nor from contracting with others for the furnishing of more water, as the needs of the city may require. It is very well settled that, in contracts with states or municipalities conferring powers, grants, or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred, all implications, doubts, and ambiguities being resolved against the grant or privilege claimed."

Richmond F. & P. R. Co. vs. Louisa R. Co., 13 How., 71, 81.

Rice vs. Railroad Co., 1 Black, 358, 480.

Stein vs. Supply Co., 141 U. S., 67, 80.

To the same effect are:

Barden vs. N. P. R. R. Co., 154 U. S., 288, 325-6.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685, 696.

Deroit Citizens' Street Ry. Co. vs. Detroit R. Co., 171 U. S., 48.

Freeport Water Co. vs. City of Freeport, 180 U. S., 587; 21 Sup. Ct. Rep., 493.

In support of their position that in granting the complainant its franchise found in ordinance No. 248, appellee impliedly agreed not to erect, maintain or become interested in water works and a water supply of its own, counsel rely for the most part upon certain expressions found in the opinion in the Walla Walla case and in the Joplin case.

In concluding this citation of authorities we call especial attention of the Court to City of Austin vs. Bartholomew, 107 Fed., 349. On page 352 that Court, through Justice Newman, says:

"Newman, District Judge, after stating the facts as above, delivered the opinion of the Court.

"The first and most important question for consideration in this case is that raised by the contention that the city, by the construction of water works of its own in 1895, violated the contract which it entered into with the City Water Company in 1882, to the wrong and damage to its successor, the Austin Water, Light and Power Company. The claim is that it was necessarily implied in the terms and provisions of the contract referred to that the city would not itself erect a system of water works, and thereby, to a large extent, destroy the value of the prop-

erty of the City Water Company. Reliance is placed largely, perhaps mainly, on the case of City of Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, Sup. Ct., 77, 43 L. Ed., 341. Much stress is laid also on the recent case of Southwest Missouri Light Co. vs. City of Joplin (decided by Judge Phillips in the Circuit Court of the United States for the Western District of Missouri in March, 1900), 101 Fed., 23. In this latter case the pertinent authorities are cited and reviewed, and in its reasoning and conclusions it is undeniably favorable to the contentions of the receiver in this case. In the case of City of Walla Walla vs. Walla Walla Water Co., supra, there was an express stipulation that the city would not erect water works of its own, although it is true that the reasoning of the court and the conclusions reached are not based entirely on this stipulation. We think, however, that the recent case of Bienville Water Supply Co. vs. City of Mobile, 175 U. S., 109, 20, Sup. Ct., 44 L. Ed., 92, being later than the Walla Walla case and more like this case in its facts, is more pertinent here.

"In this latter case the court affirmed the judgment of the circuit court in dismissing a bill which set up on behalf of the Bienville Water Supply Company against the City of Mobile substantially the same facts which are relied upon by the plaintiff here. The effect of this decision by the Supreme Court in the case of Bienville Water Supply Co. vs. City of Mobile, is emphasized as authority in this case in favor of the right of the City of

Austin to erect water works of its own by the opinion filed in the Circuit Court by Judge Toulmin (95 Fed., 539), which opinion was in review in the Supreme Court and apparently fully approved. The syllabus of the opinion in the Circuit Court is as follows: 'A contract between a city and a water company, chartered and given the right to lay its mains in the streets of the city by an act of the legislature which merely bound the company to maintain a certain number of fire hydrants, for which the city agreed to pay a specified rental for a term of years, and fixed a maximum price, beyond which the company agreed it would not charge for water furnished for domestic use during the term, but which contained no grant of any privileges to the company and no contract for furnishing water to the inhabitants of the city, nor agreement that the city should not do so, is not violated by the erection or purchase of water works by the city for the supplying of water to its inhabitants and for its own use, and affords no ground for an injunction to restrain the city from so doing in pursuance of authority contained in its charter, the city not having refused to pay the stipulated rentals.'

"But it is not necessary to further elaborate this question, as it is *res judicata* in this court. In the former opinion in this case (85 Fed., 359), by Judge Pardee, it is said: 'The contract on which this action is based is a grant and privilege for a period of twenty years to the City Water Company, to supply water to the City of

Austin, and the inhabitants thereof, with the right of extension under certain named conditions. The grant is not in terms an exclusive one, and, so far as the language used is concerned, there is nothing to hinder the city of Austin from erecting and completing, nor from granting to others the right to use the streets, nor from contracting with others for the furnishing of more water, as the needs of the city may require. It is very well settled that in contracts with states or municipalities conferring powers, grants or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred; all implications, doubts and ambiguities being resolved against the grant of privilege claimed.'—Citing Richmond, F. & P. R. C. vs. Louisa. R. Co., 13 How., 71, 81, 14 L. Ed., 55; Rice vs. Railroad Co., 1 Black, 358, 380, 17 L. Ed., 147; Bank vs. Skelly, 1 Black, 436, 445, 17 L. Ed., 173; Stein vs. Water Supply Co., 141 U. S., 67, 80, 11 Sup. Ct., 892, 35 L. Ed., 622."

And on page 353, it is said, "we shall adhere to the former ruling of the court on this question, which disposes of the claim of the receiver for general damages against the city for breach of contract," and the judgment of the Circuit Court was affirmed. But above all, this issue must be decided under the particular provisions of Section 1 of ordinance 248, which *expressly* confers an *option* instead of an *absolute obligation,* and, unless authorities are produced that by judicial construction it

can be changed by implication to an absolute and unqualified obligation, we apprehend none will be applicable. If we are right in the construction of the *ordinance* under the rules laid down by the statute at the time of its adoption, the matter is placed beyond doubt, while the same results would follow from the doctrine announced in the Skaneateles case.

Even assuming the law to be that where there is no obligation on the part of the water company to furnish the city water, that no obligation to take it can be implied and that e-converso where there is an obligation to furnish it, there is an implied obligation to take it. The main point yet remains to be determined: Has the city not the right to limit its obligation to take, to an option, and if so, has it done it in *this* case? It cannot be assumed that an obligation to furnish unalterably fixes the duty to take and places it beyond the power of the parties to contract in reference to it. The matter is not contrary to public policy, or good morals. Is it unreasonable that the city should not want to bind itself to take the water for the period of twenty years? Because it has taken it for a while when it *desired* to do so, is it compelled to continue it against its will? Indeed the conclusion is irresistible, under the *terms* of the ordinance, that appellant, inconsideration of the franchise, is required to furnish water to the city and its inhabitants for twenty years, but that the city is not required to take it, unless it sees proper to do so, with or without a plant of its own.

It has a right reserved in the ordinance to put in its plant in the meantime, and the fact that it has done so, or will exercise the right to do so, cannot impair or interfere with this option. The option carries with it, as an incident, all the means necessary and proper to make it available, chiefly among which is installing the plant upon which this injunction operates. The maxim is "*Accessorium non ducit sed sequitur sum principale.*" No inference should be drawn or implied that will defeat the express terms of a valid and reasonable contract.

The city must be conceded the right to contract for water for the inhabitants, to give appellant any standing whatever under the ordinance. Assuming for the purposes of this argument that it has such right, it follows that the inhabitants have a right to consider it as a source of securing a supply. It makes it a legitimate business, and the inhabitants must have some rights in this matter.

The city may contract for a water supply for itself, and *possibly* the doctrine of estoppel would apply to it. But can it go further in contracting for water for the inhabitants than securing them a supply? Can it obligate them to take the water when so supplied any more than it can contract for other domestic and family supplies and require them to take them? It has the right under the law of its creation to contract for a supply of water for the inhabitants, but it is carrying the matter a long way to say that the privilege of taking it or not is swept away. The city cannot grant any exclusive privileges, as against

the inhabitants, becaus it does away with competition, to which they are entitled. This being so, they are entitled to have all lawful competitors engage in the business that desire to do so. Hence, it would follow that as the city had the right to furnish the inhabitants, and the inhabitants had a right to full competition, it is against public policy to allow the city to contract not to engage in furnishing the city with water for twenty years, and the law, even disregarding the express provision that neither the city for itself or its inhabitants shall be required to take it unless they desired to do so, would never raise an *implied* agreement that they had so contracted. But under the rule of construction laid down in such cases, when public rights are to be granted away, we can nowhere find that the city has contracted to surrender its rights to furnish the inhabitants with water. We find that in Section 1 of the ordinance, on the contrary, the only place in which the obligation of the city is referred to, that it expressly provides that it shall be at its option to take during the existence of the franchise, *i. e.*, is subject and limited to its desires in that particular. An implied contract is never implied in the face of a valid, reasonable express provision. To permit this would present a clear case of the tail wagging the dog.

* * * * * * * *

To avoid the force of the reservation contained in Section 3, it is also claimed that it is nothing more than a

declaration that the franchise is not exclusive, and secures only the right to occupy the streets with its pipes and mains, but that it is precluded from he use of them in supplying the inhabitants of the city with water. No one questions the power of the city to put in water works for itself and its inhabitants, because both are of a public nature. The contention is that it has ceded away this right by the terms of the ordinance. The sum and substance of the argument is that the right thus reserved is limited to constructing the works, but that it is inhibited by the ordinance to the use of them as a supply of water for its inhabitants. This is directly in conflict with the universal maxim that the full beneficial use is incident to and passes with the grant. Besides, the constitution contemplates the raising of funds from the revenue derived from the sale of water, as one of the means of paying off the indebtedness incurred in installing its works. It was manifestly not contemplated that the city would sell water to itself but get this revenue from the sale of water to its inhabitants. So the theory of construction contended for is not only in conflict with the general maxim that the right to put in works carries with it all the beneficial and lawful use of them, but is directly in conflict with the whole purpose and object of the works as thus contemplated by the constitution. The learned solicitors for appellant, to emphasize their position, italicize that part of Section 3, which reads, "*So long as such franchises, rights and easements do not interfere with the franchises, rights and ease-*

ments hereby granted,'' thereby assuming that this reservation, if given its literal construction, would conflict with such franchise, rights and easements. This is just what we claim. If given the construction urged by appellant, it is in direct conflict with this express provision, and the implication urged does not for that reason arise. We look in vain for any express provision depriving appellee of the rights it is seeking to avail itself of, and the point is that no implication can arise in the face of the express terms of this reservation. We cannot ignore the beneficial use of the right expressly reserved to enable the implied obligation claimed to obtain. Where there is manifest repugnancy, as is the case here, the latter gives way and the former prevails. The right to bring in water for the city and its inhabitants carries with it the right to furnish it to them, and especially is this so under the constitution and laws. It is difficult to argue the question that, notwithstanding the city has reserved the right to put in the plant, yet there is an implied obligation that it will not utilize it. Indeed the reservation of the right to construct or *maintain* works and plants of a public nature is but an emphatic way of expressing what had theretofore been implied by the express provision that the franchises granted should not be conclusive, and that neither the city for itself or for its inhabitants was under any obligation to take water of appellant. The case in a nutshell is that the express reservation was intended to and does repel the implication claimed, and removes the matter beyond

doubt. The grant of power to the city enabled it to put in and maintain these water works because they were of a public nature, and for like reasons, it is retained by the reservation.

If we admit what is inferentially conceded, that the right to construct and *maintain* the works is reserved by the section, and yet the right to sell water to the inhabitants is forbidden by the ordinance, then, of course, there is repugnancy between the express reservation and the implied prohibition, because it is a part of the franchises, rights and easements granted. But if the implication does not arise, so as to create the repugnancy, all the provisions are in harmony and, as suggested, they must be construed *in pari materia*. There is no repugnancy if the contract is left as the parties made it, and the rule is, the court will not insert what is omitted, or omit what has been inserted, and give it such construction, if possible, as will avoid the repugnancy. To make the implication insisted upon, under present conditions, is doing no more or less than ignoring the contract made by the parties, and creating a new and different one for them. We claim that under the best considered cases the implication does not arise, without the reservation, and that with it, if water works to supply the inhabitants of the city with waer are of a public nature, it is impossible for such an implication to arise. If they are of a public nature, the right cannot be taken away without violating the obligation of the contract. Appellee had the right to put in

the works before the contract was made because they were of a public nature, and by the express terms of the contract it has reserved it. To say that the right to construct and *maintain* water works to supply the inhabitants of the city with water does not comprise the right to dispose of it to them, is too manifestly inconsistent and contradictory for serious consideration, and especially is it so when considered in connection with the constitution heretofore quoted, which makes such disposition of the water the very source of revenue in constructing and maintaining the works.

Of all the words in the English language "*maintain*" is perhaps the most appropriate in this connection, as the works are to receive their support from the revenues derived from sales of water to the inhabitants under the constitution. Without this incident the city, for itself and for its inhabitants, is utterly powerless to construct or *mainain* its own water works. It is as inconceivable as for the plant to flourish without the support of the soil from which it sprang.

Solicitors conclude by calling attention to the fact that the city is not enjoined from putting in a plant for municipal purposes. This is a potent reason why it should not be enjoined from doing so for the inhabitants, as this is the source of revenue under the constitution. The implied obligation urged applies with full force to the city in the exercise of the power conferred in both instances. The sections of the ordinance are equally applicable to both

propositions. The decision theretofore made giving the city the right is equally applicable to the exercise of the right for the benefit of its inhabitants. It is a precedent, like a decision concerning a series of bonds. What is applicable to one is applicable to the whole family of bonds. Precisely the same reservation applies to the city in the one case as in the other, and it is comprised in the express provision that nothing contained in the ordinance should be so construed as to preclude the city from constructing or *maintaining* works of a public nature. The works are of a public nature, and that ought to end it.

* * * * * * * *

Here we call attention of the Court to the motion to dismiss under a decision of this Court made since preparing this brief, in point upon the questions argued, and insert it for convenience:

MOTION TO DISMISS OR TO AFFIRM.

Now comes the appellee in the above entitled suit, and moves the Court to dismiss the appeal therein, for that it manifestly appears from the record, that it has no jurisdiction to hear and determine the same upon the merits thereof:

I.

The decision from which the appeal is taken is not based and does not rest upon the construction of any act

of Congress or interpretation of any provision of the Federal Constitution.

II.

It is apparent from the record that the franchise contract contains no obligation, expressed or implied, upon which the alleged error of appellant, in volving a Federal question, can rest.

III.

The constitutional provisions invoked by appellant are in no wise involved under the franchise contract so as to confer jurisdiction upon this Court.

IV.

Appellee, in connection with its motion to dismiss for want of jurisdiction, also moves the Court to affirm for that it manifestly appears from the record that the appeal was taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

EDWARD HORSKY,
City Attorney,

EDWIN W .TOOLE, and
THOMAS C. BACH,
Attorneys for Appellee.

(TITLE OF COURT AND CAUSE.)

NOTICE OF SUBMISSION OF MOTION.

To Messrs. M. S. Gunn, and Carpenter and Carpenter, Counsel for Appellant:

Please take notice that on Monday, the 21st day of February, 1904, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

EDWARD HORSKY,
City Attorney,

EDWIN W .TOOLE, and
THOMAS C. BACH,
Attorneys for Appellee.

Receipt of the foregoing notice of motion, and receipt of a copy thereof, together with receipt of copies of the brief of argument therein referred to, are hereby acknowledged and admitted this 30th day of January, A. D. 1904.

M. S. GUNN,
B. PLATT CARPENTER,
STEPHEN CARPENTER,
Counsel for Appellant.

(TITLE OF COURT AND CAUSE.)

BRIEF.

In support of the foregoing motion appellee respectfully submits the following points and authorities:

I.

The pleadings and records show that on the 15th day of January, 1890, the City of Helena adopted ordinance No. 248 (Exhibit "A," Record 9), which was duly accepted by the appellant. In it was contained a franchise. Appellant claimed that said franchise contained certain "implied" obligations on the part of the city, and upon the existence of these alleged obligations and the alleged violation thereof, the right of this appeal depends. Under the organic law of the Territory of Montana its legislative assembly was at that time prohibited from passing any law "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." The constitution and laws of the State are in line with this theory, and the laws of the territory followed the organic law.

"The legislative assembly shall not pass any local or special laws in any of the following enumerated cases, that is to say: * * * granting to any corporation, association or individual, * * * any special or exclusive privilege, immunity or franchise whatever."

Montana Const., Article V, Sec. 26.

Aside from all this, the very terms of the franchise contract emphatically declare that no such rights are conferred. While in consideration of the franchise contract it exacts certain duties of the appellant, it nevertheless expressly provides: "That nothing herein contained shall be construed so as to give to the Helena Consolidated Water Company, or its successors or assigns, the exclusive right * * * of conveying, distributing or selling the same throughout the said city or of furnishing the same to the said city except as herein set forth."

Ord 248, Fol. 18, 19, page 10.

"Nothing contained herein shall preclude said city of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted."

Section 3, pages 10, 11.

"Provided, always, that said company shall not refuse to permit connections to be made by or to sell and deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this

ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules andl regulations of said company."

Section 17, page 15.

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidatd Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

Section 26, page 18.

It is manifest that there is no inhibition to prevent this provision of the franchise contract and that the parties are bound by it. There is therefore a franchise contract by which the appellant is allowed to furnish water to the inhabitants, if they desire to take it at the maximum rates fixed. This brings the question involved squarely within the decision of this Court in

City of Joplin, appellant, v. Southwest Missouri Light Company, reported in Advance Sheet, Supreme Court of the United States Reports, December, 1903, No. 32, decided November 16, 1903.

In this case Mr. Justice McKenna, in speaking for the Court, in terse and potential language, says: "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government."

The substance of the decision is that, as in the case at hand, there is neither an express or implied obligation not to put in competitive works.

II.

There is but one other question, therefore, left to consider: If the record shows that there is no violation of any obligation of the franchise contract upon which a constitutional question is involved, there being no act of congress applicable or to be interpreted, it logically follows that the Court will say that there is no jurisdiction except to dismiss the appeal.

This would seem to be the logical conclusion. It is a condition precedent to the exercise of jurisdiction and it would be a hard proposition to maintain that the juris-

diction could be sustained without it. It goes without saying that there is no express or implied obligation upon which to rest a constitutional question. Upon this preliminary proposition depends the jurisdiction of this Court to reach the Federal question and pass upon its merits. If there is no obligation in the franchise contract to be violated in respect to the matters contended for it cannot in reason be said that any constitutional question can possibly be involved. The whole matter is solved in the interpretation of the franchise contract and no pretension is made that any act of Congress or its interpretation is involved and the jurisdictional question depends solely upon the proposition as to whether there exists any obligation to be violated.

When an appeal is taken and the error assigned is based upon the violation of one of the obligations of the contract, and it is manifest from the record that no such obligation exists, the Court has no power or jurisdiction except to dismiss the action and no inquiry into the merits can be had or required. Whether the alleged error referred to the remedy or the violation of the obligations of a contract would of course be without merit, as the condition precedent upon which it must rest does not exist. So it is apparent, there is no obligation, express or implied, upon which to predicate a constitutional question, upon which the error is assigned. Should this case go to final hearing it would seem that all this Court could

do would be to dismiss the appeal, and that is just what is asked by the motion.

Conceding that notwithstanding the decisions heretofore made in this case this Court can and will consider the question of the obligations contained in the contract as germane to the jurisdictional question, it still remains a preliminary and conditional one upon which such jurisdiction depends. If it can properly be decided upon this motion, the necessity of such a speedy determination is potentially suggested from the very nature of the controversy, and facts contained in the record. If it is apparent from the record that all that could be done upon a final hearing would be a dismissal of the appeal for want of jurisdiction, it would seem that this motion should be sustained. We have assumed, of course, if this motion is proper, the Court upon final hearing could not affirm or reverse the judgment and enter any other order than that dismissing the appeal.

The appellee respectfully submits that the points made in this motion are fully and unequivocally sustained by the following authorities:

Moran v. Horsky, 178 U. S., 205.

St. Paul Gas Light Co. v. St. Paul, 181 U. S., 142, 147.

New Orleans Water Co. v. Louisiana Sugar Refining Co., 125 U. S., 18.

City of New Orleans v. New Orleans Water Works Co., 142 U. S., 79.

New Orleans Water Works Co. v. Louisiana, 185 U. S., 336, 345.

Mobile and Ohio Railroad Co. v. Tennessee, 153 U. S., 486.

Hamblin v. Western Land Co., 147 U. S., 532.

Wilson v. North Carolina, 169 U. S., 595.

Muse v. Arlington Hotel Co., 168 U. S., 430, 435.

Shreveport v. Cole, 129 U. S., 36.

McCain v. Des Moines, 174 U. S., 168.

If this Court is of the opinion that there is no express or implied obligation in the franchise contract, upon which a constitutional question could rest, and that the decision of the trial and appellate court rested upon those grounds and none other, then it logically follows that it is based properly upon grounds independent of the constitutional question sought to be raised. It may be regarded as incidental in a sense to the constitutional question, yet it is preliminary to the jurisdiction and must be determined in advance whether on motion or at the final hearing. While we are not able to find authorities *directly* in point upon the question in hand, the reasoning and analogy in the cases cited seems to be so complete as to remove all doubt of their applicability and

controlling effect. It would seem that the question of jurisdiction ought always to be considered and determined at any stage of the case, especially where it is presented and a ruling upon it requested.

But little further need be said in support of the fourth ground of this motion.

The assumption that competition when not *limited* or *restricted* is taking the property of a competitor without compensation or due process of law is too absurd and contradictory to require argument to refute it. The *power* of the city under the constitution and laws to make a franchise contract reserving the right to put in competitive works and plants, cannot be doubted, and that it has done so is beyond question. It logically and emphatically follows that the appeal, which depends *entirely* upon the violation of the obligations of the contract, in putting in said works, is clearly frivolous, and cannot be maintained upon the same grounds, under the facts in this case, that it was contended for below.

The correct doctrine certainly is, as announced by this Court in the Joplin case, that the right to put in such works or plants of a public nature exists without such express reservation. What then can be said of the good faith of an appeal taken and sought to be maintained in the very face of the express provision of the franchise contract that provides it shall not be exclusive, and that the city reserves the right to put in any works or plants of a public nature. And the power to cede away *such a*

right necessarily remains with it as a public right, and the *power* to reserve it is simply a retention of then existing right. The act of Congress involving this appeal must, of course, depend upon, whether it involves *construction* or *application* of, the Constitution of the United States. No question of constitutionality of any Federal law, or the construction of any treaty entered into under its authority, is brought in question, nor is the Constitution or the laws of the State claimed to be violated.

Appellant assumes that there is an implied contract that its franchise shall be exclusive, but the express provision of the contract is that it shall not be. It assumes that there is an implied obligation that the city will not put in its own plant or works, but the express terms of the contract provide that the city may do so. As certain as the city possesses the power to confer the right claimed, that certain it is it could retain it, and this it has done.

The whole question, therefore, in the fourth ground of the motion, is confined to the proposition whether an appeal sought to be maintained, fairly and squarely, in the face of the primary rights of the parties, does not come within the language and meaning of the rule upon which the motion in this respect applies. We respectfully submit that it does. It goes without saying, if the franchise contract has no express or implied obligation by which the appellee is not entitled to put in a competitive plant of its own, then there is no obligation to be violated and in the very nature of things could be no taking of

property without just compensation or due process of law. If, therefore, the Court should be of opinion that this question is so intimately connected with or incidental to the constitutional question that it might properly be considered upon the final hearing, we respectfully submit that the grounds upon which the constitutional question rests are absolutely frivolous and brings the case clearly within the provisions of Subdivision 5 of Rule 6 of this Court.

The Joplin case, to which we have heretofore referred, conclusively settles the legal proposition involved; besides, in this appeal it appears in the record that the franchise privileges could not be made exclusive under the constitution and laws of the State, and by the express provisions of the contract itself no such rights are conferred or intended to be conferred. Aside from this it is expressly provided, as we have seen, that it shall not be exclusive or prevent appellee from constructing or maintaining sewers or other works or plants of a public nature.

We take it that this rule of Court was intended to meet a case like this, where a corporation had secured the suspension of the exercise of the powers and privileges of a city to install water works of its own. If the case presents one that is frivolous and cannot be maintained, this motion will be granted and the rights secured to the city afforded to it; otherwise great and serious injustice might result.

While in the argument upon the motion to dismiss

or affirm we have relied to a very great extent upon the fact that the right to install a plant of its own and operate the same, is a constitutional right, in the interest of the public, which cannot be frittered away under the guise of a contract, yet by the express terms of the contract it has been retained and reserved. In this we have gone further than was necessary under the decisions and reasons which control this case. The real and paramount point is, that the city has not expressly attempted to grant away this right and that in the absence of these reservations, under the rule of law applicable, no implied obligation will be indulged in the face of the fact that no exclusive privilege of selling the water could be or was attempted to be granted.

* * * * * * * *

THE MANDAMUS CASE.

It will be observed in this connection that appellant has pleaded the judgment in this action as an estoppel, in that it establishes a *contractual* obligation on the part of appellant to furnish water to the inhabitants, and that on this account there was and is an implied obligation that the city would not bring in a plant of its own, and it now seeks to prevent it from doing so. We concede that appellant, succeeding to the rights of the Helena Consolidated Water Company under its purchase at judicial sale, is entitled to the benefit of this judgment and that it is avail-

able under the stipulation for just what it is worth. This necessarily involves the consideration of the extent and scope of the judgment. Appellant's predecessor was a corporation organized under the laws of the State of Montana and subject to its laws.

As shown by its articles of incorporation, its object was, among others, to secure a franchise to lay its pipes and sell water to the City of Helena and its inhabitants. It in no way contemplates an exclusive privilege to sell water, but the privilege of doing so under its franchise. Its complaint avers that it has an abundant supply for that purpose and the agreed statement of facts concedes it to be so.

The statute in force at the time and now in force required the predecessor in interest of appellant to sell to any one desiring to purchase, when it had water, upon the tender or payment of the customary rates. It would be its *duty* to do this, on account of its franchise and right of eminent domain, without such provision, as much as it is the duty of a railroad to carry freight and passengers when it has the facilities to carry them. And it may be said in so far as the public duty and right is concerned, the inhabitants are no more obligated to purchase the water of appellant than one desiring to travel or freight goods is to transport and freight by the railroad. Now while appellant is a foreign corporation under the constitution and laws of the State of Montana, it is not entitled to any greater privileges and exemptions than a local

corporation and any duty to the public, therefore, is required to be performed as though it were a local corporation. Hence it is clear to be seen that a public duty may be involved in contradistinction to an obligation arising out of an agreement. The duty arising in the former is enforced by mandamus and the latter in many cases by injunction and various other equitable remedies. And so it is, to enforce this *duty* as distinguished from an *obligation* arising from an agreement, resort was had to an *action* as it is denominated under our code for a writ of mandamus. It follows that the scope and extent of the judgment is limited to the sphere and subject matter involved, *i. e.*, the public duty as distinguished from *obligations* arising out of agreements. The result is that the adjudication is to the effect that it is a public duty which appellant's predecessor owes the city as distinguished from an obligation arising from an agreement.

But we are not confined alone to this as a legal or logical sequence. The *judgment* and decision of the court *in fact decides* this *very* question, and as successors in interest to the plaintiff in that case it is an estoppel between the parties here, upon the question *actually decided*. In the very able decision of the trial judge and as a finding upon which the judgment pleaded is based, on page 207 of the record, he uses this language:

"I am of opinion, then, that pending the settlement of these rates respondent must supply the city with water; that this results from the public duty imposed upon it

when it accepted its charter from the State and its franchise from the city." By paragraph 2 of the agreed statement of facts it is agreed that this "judgment as alleged is in full force and unreversed." This judgment instead of establishing what is claimed for it that the obligation arose out of an agreement, emphatically declares that it grows out of the franchise and charter and is a public duty, a *quid pro quo* on that account. And yet under all these conditions and facts, without any consideration except the performance of a legal duty, we are asked to imply a contractual *obligation* by which the city surrenders its rights of a public character to bring in its own water works.

Besides all this, under Section 17 of the ordinance this language is used: "Provided always that said company shall not refuse * * * to sell or deliver water to any person who shall offer to pay for the same and shall comply with the provisions of this ordinance," thereby showing it to be a bare privilege and not an obligation, to purchase, as expressed in Section1.

And in Section 3 it provides, "Nothing contained herein shall preclude the City of Helena from the * * * construction or maintenance of sewer works, or *other works or plants of a public* nature, or from letting, giving or granting and franchises, rights or easements to any person or persons, corporation or corporations whatsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements

hereby granted." It then provides that the water company must look to the trespasser for any interference with its pipes, mains, etc. Thus showing that it refers to actual damage and not damages arising from competition in the sale of water. No one versed in the law would assume for a moment, under existing conditions that either the city or its inhabitants are liable for damages for a refusal or failure to purchase the water, which would be the result if there was any implied obligation to do so.

But above all, as will be seen, the franchises granted are defined in Section 1 to be the use of the streets, to utilize its plant, and sell water to the city and its inhabitants, if they *desire to purchase the same.*

Pursuing this subject further, Section 6, as heretofore suggested, is the only one that requires the appellant to furnish water to the *city* and *inhabitants* aside from Section 26. But it must be noted that aside from the *public duty* to furnish water during the existence of the franchise, the *agreement* to do so is only for five years, which has long since expired. So that, in so far as any *obligation* by agreement is concerned, enforceable under *this suit,* none now exists and none existed at the time of the commencement of it. The result is that since the contractual obligation expired the relative rights and duties are such as arise from the franchise pure and simple.

Section 6 reads:

"Sec. 6. The said Helena Consolidated Water Com-

pany shall furnish and provide a full ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use."

Upon the trial it was claimed that Section 26 extended this contractual obligation beyond five years as *expressed* in Section 6. We do not so consider it. By Section 21 appropriations for the payment for the water were limited to the five years and no provision is made beyond it. Under Section 6 the city and inhabitants are upon the same plane and occupy identically the same position and status. The obligation under the *agreement* contained in it, if any, expires as to the city and also as to furnishing the inhabitants. We concede the continuance of the public duty to furnish the water, from thence on constitutes the exact relation of the parties, but deny any implied obligation to purchase, upon which this suit rests. Now Section 26 was adopted at the very time the *agreement* was made by Section 6, to furnish water for five years, and Section 26 reads:

"Sec. 26. It is hereby declared and understood to

be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

Now the only *agreement* to furnish water being contained in Sections 1 and 6, Section 26 manifestly refers to it and uses the phrase, "It is hereby declared and understood, to be of the essence of *the agreement* and acceptanie *hereof*," not thereof, that it will furnish water not only during the whole term of the franchise, which it was its *duty* to do, but "during the term of such agreement," and shall sell and distribute the same "upon the terms and conditions herein provided and *expressed*," not implied. The terms and conditions expressed are if the city and inhabitants desire to purchase. The general rule of construction requires that effect be given to each section, and the statute expressly says they shall be so interpreted. If there is a *contractual* obligation to furnish water for the full period of the franchise then Section 6 limiting it to five years is meaningless and has no effect whatever. Limiting Section 26 to just what it is intended, *i. e.*, to declare what is the essence of the *agreement* contained in Section 6, effect is given to all and the parties are left from then on without any contractual obligations, and

their rights are regulated by the public duty growing out of the franchise, and this is exactly what is decided in the action for a mandamus. There can be then no *implied contract* to furnish the water, upon which to base the few decisions following the theory that the city on account thereof had surrendered the public right to bring in its own plant. Perhaps few words in the English language have undergone so many judicial interpretations as the word "inhabitant." This has arisen on account of the various connections in which it is used. So that the ultimate result is, the connection in which it is used determines the meaning to be given it. The connection in which it is used in Section 26, of ordinance 248, would not include as it otherwise would, all persons, companies and corporations, because it refers to a quality of water, that does not necessarily include all. To that extent it may be regarded as a limitation, upon its meaning of the words persons, companies and corporations theretofore used to those desiring to use it for culinary, drinking or domestic purposes. Hence, while inhabitants in a general sense would be included in any person, company or corporation, it is limited as used in the particular suggested. Transactions by which competitive bidding is obstructed are usually regarded with great disfavor, as *tending* to create a monopoly. To avert this and afford full, free and complete competition, the constitution of Montana provides, "That the legislative assembly shall pass no law granting to any corporation, association or individual

* * * any special or exclusive privilege, immunity or franchise whatever." By excluding the city from a right to compete you deprive the inhabitants of the city to have it as a competitor. It is against public policy so long as the inhabitants are entitled to have it as a competitor to so contract as to deprive them of that right, *i. e.*, to operate as an estoppel against the city, as much as it would be for a merchant to agree to not sell goods in the city for a period of twenty years. If such power exists at all it is of such a nature as to require the obligation to be express. In the face of these provisions and the reservation in the ordinance it will certainly not be implied. Indeed, in the absence of all this, under a majority and the best reasoned decision holds that an absolute obligation to furnish does not imply an obligation to take. It is not a question of taking the right of competition away by a twenty year contract, but taking it away while the right exists. This adjudication, and the proper deductions from ordinance 248, brings this case on all fours with the Skaneateles case, and there we let it rest.

III.

Estoppel by Former Judgment.

The grounds upon which this plea of estoppel rests are set out in the agreed statement of facts, which for convenience sake we here produce.

Record, p. 48, VII, reads:

"It is also agreed that an election held at said city

on the 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof by the legal voters of said city. That thereafter the city council of said city by resolution duly passed, directed the city clerk to advertise for bids for a supply of water to be furnished, owned and controlled by said city in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters as hereinabove in paragraph IV stated. That on the 14th day of December, A. D. 1895, said The Helena Consolidated Water Company, predecessor in interest of complainant, commenced its action in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, by which it sought to enjoin the defendant from advertising and receiving bids for said purpose, and to which complaint, defendant, the City of Helena, duly filed its answer; that a restraining order was duly issued and an appeal therefrom duly taken to the Supreme Court of the State, and by that Court the said judgment so appealed from, was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreversed, and a copy of the pleadings, order for

injunction, appeal, judgment and opinion of the Supreme Court are hereto attached and admitted with all the force and effect to which the same may be and are entitled."

It will be noted that appellee does not claim that the *same* question here involved was *actually* decided, but that it was *necessarily* decided for the reason that the *judgment* under the *issues* could not have been rendered without deciding it adversely to appellant. That is to say, it is *necessarily* so decided to maintain the judgment under the issues. This requires an examination of the pleadings and issues to ascertain what was necessarily decided and concluded by the judgment in the action. It will be noted in the outset that the action now under consideration is not like the one heretofore discussed, which was mandamus and based upon the duties of the water company under its charter and franchise, but an action in equity like the present suit upon what is claimed to be *contractual obligations*. The action was commenced like the present suit, by the predecessor in interest of appellant, in its dual capacity of taxpayer, and its rights under its certificate of incorporation and franchise under ordinance 248, and what is also known as the rider. The object of the action was, as is the present one, to enjoin the appellee from putting in its own water plant, which it is now seeking to do.

We call especial attention of the Court to the complaint in the former action, found on page 53 et seq., and the answer on page 126 et seq., of the record, containing

at large the issues presented for trial. For convenience, however, we give a synopsis of what is deemed to be the matters material to the determination of the estoppel.

The complaint alleges that plaintiff is a taxpayer and brings the action for himself as such and all others similarly situated; it claims, especially under ordinances 95 and 248, and makes them, as it does here, a part of the complaint; it alleges an acceptance of and compliance with them in every respect, and that it has been furnishing water to the city and inhabitants in pursuance of them for a long time and that it is still doing so; that it has a right and is entitled to furnish and supply the city and its inhabitants with water under said ordinance; that the city is taking steps to construct and maintain a water plant of is own, and then sets up what is known as the rider. Upon these claims and rights it asks that the city be enjoined, and prays for the same rlief that is sought in this suit. It asserts its rights, first, as a taxpayer; second, under ordinances 95 and 248; third, upon the rider requiring the city to purchase its plant before it can bring in one of its own. Upon these three titles it based its cause of action, the object of which was to prevent the city from constructing and maintaining a plant to supply itself and its inhabitants with water. The answer in many instances denies the allegations of the complaint, but as the case was determined upon the sufficiency of the complaint, *i. e.*, assuming the facts alleged to be true, that the plaintiff was not entitled to an injunction or any other

relief, the answer and replication are immaterial to the question of estoppel now presented. A cursory perusal of the complaint in the former case will show that the same issue is tendered ,the same rights asserted and the same object sought to be attained. The trial court granted an injunction, this appellee appealed therefrom to the Supreme Court of the State, and according to the agreed statement of facts, the following judgment was entered: "That the judgment and order appealed from are reversed and the cause remanded with directions to dissolve the injunction and dismiss plaintiff's complaint;" and that a remittur issued and final judgment was entered accordingly, which is still in full force and effect. Appellant claims as a successor in interest of the plaintiff in the action thus disposed of, under purchase at judicial sale, upon the foreclosure of a mortgage on the property and franchise of the plaintiff in the former action. Was the precise *question* now presented *necessarily* or *actually* decided in the former action, and if so, is appellant, as a purchaser under the foreclosure sale, estopped by the judgment?

As we have heretofore seen, the only new matter set up inthis suit concerning appellant's rights as a taxpayer relates to the Beaver Creek water, which had passed the reach of injunction. The other questions are absolutely identical and come squarely within the rule making the former judgment an estoppel, if appellant is a privy or bound by it. The validity of the rider was directly in

issue and *necessarily and actually* determined adversely to the predecessor in interest of appellant, and if it is bound by it as such successor, operates as an estoppel. The only room for contention refers to the right of appellant then and now asserted under ordinances 95 and 248, which it was claimed was neither *necessarily* or *actually* decided, and to that this discussion will be confined. Was the question here involved *necessarily* decided in the former action?

The rule seems to be that when the facts upon which a right or title is pleaded and upon which a recovery can be had, a dismissal of the bill *necessarily* determines that the plaintiff is not entitled to relief. In the former case the ordinances being set out in full in the complaint, and acceptance and compliance with all their terms being alleged, a complete and perfect contract and cause of action is alleged, if any exists. The inference as to the legal effect of these allegations is one of law, and had the pleader alleged that on account of such fact there was an obligation on the part of defendant to purchase the water, and for which reason it is estopped from putting in its plant, such averment would be stricken out as a conclusion of law under the code of Montana, and the pleading permitted to rest upon the allegations of fact showing the contract.

A distinction must of course me made in reaching the gravamen of the real issue, between cases where a party might have set out his title in full and had it litigated in

the action and did not do so, and, as in the former case, where the particular title, under the ordinances, is set out and might have been tried. In the former case some authorities hold that it should have been pleaded—*i. e.*, all the title the complaining party had to maintain his action, and if he did not do so he was bound by the judgment; while in the latter it is uniformly held that the judgment *necessarily* determines the right, and is *res judicata* whether actually tried or not. In other words, when the issue as to the particular title is tendered, it cannot be abandoned on the trial without relinquishing the claim, and suffering the consequences of the judgment under the pleadings.

The title of the complainant under the contractual obligations of the ordinance and its rights under the rider went to make up a cause of action for the injunction and the judgment imports a determination of the cause of action thus alleged. It must be conceded that if plaintiff was entitled to an injunction under *either* of the three titles pleaded the complaint should be sustained and the injunction granted. The converse of this proposition is equally true, if the complaint is dismissed upon the merits, it is a determination that a recovery cannot be had upon *either* of the titles pleaded. Either may be abandoned as untenable, and the court may pursue that theory, but the result of the adjudication had by the judgment under the pleadings cannot be avoided in that way. If it could,

by splitting up his claim, there might be no end to litigation.

To illustrate, counsel in their brief, which is a part of the records, suggests to the court, notwithstanding these allegations, "The only question presented for the determination of the court is as to the constitutionality of paragraph 64, Section 4800," thereby virtually conceding that the claim as a taxpayer and under ordinances 95 and 248 were of no consequence. The court of course followed this suggestion, but as we shall see this does not avoid the binding force of the judgment under the *title pleading*.

The court, in accordance with this suggestion, 20 Montana, page 1, ignores the right and title set up as a taxpayer under the ordinances and says: "But we agree with counsel for respondent that the only question presented for our determination is as to the constitutionality of the two provisos of subdivision 64 of Section 4800," *i. e.*, the rider.

And on page 12, in relation to this very question under the ordinance, in our judgment, notwithstanding it was regarded as immaterial by counsel, the court not only *necessarily* but *actually* decided it by using this language: "Under the contract or franchise under which plaintiff bases its right of action the *city reserved* the right to enter into contracts with and purchase water from any other person or corporation for city purposes." It thus decides that under the reservation we have heretofore dis-

cussed, which includes also the furnishing of water for the inhabitants, no contractual obligation was ever entered into by which it agreed to purchase the water unless it desired to do so, and upon which the right to the injunction in this suit depends.

Under the issues thus tendered by the pleadings it was conceded that, aside from the *rider*, the city could bring in its own water plant and maintain it. This was an abandonment of all other rights to prevent it from so doing under the pleadings, and left the only question for determination the constitutionality of the rider. Naturally enough, if the ordinance *propria vigore*, deprived defendant city of this right, the constiutionality of the ridar was utterly immaterial. To make it conrolling, the right under the ordinance to establish its own plant, and as a taxpayer, must be conceded. This was done and the court agreed upon this construction of the ordinance, which made it *res judicata*, and proceeded to determine the constitutionality of the rider as the *only* question left for its determination, *i. e.*, it assumed that the claim as a taxpayer, and the ordinance, *per se*, did not prevent the city from establishing the plant. It is now claimed that this right of complainant as a taxpayer and under the ordinance, would have sustained the injunction, and that these matters, thus conceded and abandoned, are still open for investigation and determination. Under such circumstances the court in limiting its consideration to the single matter of the validity of the rider, could not and did not

relieve complainant of the effect of the judgment as *res judicata* as to the matter conceded and abandoned and which, as now claimed, would have supported its cause of action.

It is to be presumed that the City of Helena was apprised of the fact that some courts had held that where there was an obligation imposed upon the water company to furnish it and the inhabitants water during the franchise, that there was an implied obligation that the city would take it, and by this precluded itself from bringing in its own water plant. It is to be presumed that the city knew that if it was *expressly* provided that the city would take the water only in the event it *desired* to take it, that it was tantamount to a reservation of a right to put in its own plant, and that in the face of that provision no court would enjoin it from exercising this reserved right. And it will be assumed that the chief justice had this in view when he said the city had reserved the right to "enter into contracts with and purchase water from any person or corporation for city purposes."

The franchise granted is the right to lay its mains and pipes in the public streets for the purpose of selling water to the *city* and inhabitants. To prevent operating as an implied obligation to purchase, thereby clouding the right in the meantime, it provides, "in case said city desires to purchase the same," and the right to sell all others "desiring to purchase the same." The decision of the court refers to the construction of the law, is local in its

application, decides the question involved and is a precedent, if not *res judicata*, to be followed by the Federal Courts. The language of the granting clause is: "There is hereby granted to the Helena Consolidated Water Company and its successors and assigns, for the full term of *twenty years* from the passage hereof, the *license* and *franchise* of laying and maintaining water mains and pipes in and through all the streets, alleys, avenues and public grounds of the City of Helena for the *purpose* of *conveying* and *distributing* water *through the said city* and for the purpose of selling the same to *all persons, bodies or corporations within the said city, desiring to purchase the same,*" with a like provision and *reservation* as to the purchasing by the city for "fire, sewerage and other purposes." It is not at all surprising that the City of Helena, under its advertisement for proposals, when ordinance 248 was presented, should insist that Section 26, referring to the character of the water and that it be made the essence of the agreement, should be added, and that in so far as purchasing the water for itself and by all others within its limits is concerned, there should be no obligation to purchase, but a right to do so if desired. These are prominent and controlling features of the ordinance, reconcilable with all its other provisions, and cannot be disregarded in the construction to be given it without great and serious injustice. The question or principle of construction has therefore actually been established and is a precedent if not an estoppel. But it is an estoppel

because *necessary* to be decided under the complaint to justify its dismissal.

In Aurora City vs. West, 7 Wallace, 82, the Supreme Court of the United States, on pages 95, 96 and 97, uses this language:

"Aside from all these questions, and independent of the form of the replications, the defendants make two objections to the theory, that the former judgments, set up in this case, are a conclusive answer to the respective defenses pleaded in their several special pleas.

First. They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents substantially the same questions as those determined in the former suit. Where the second suit presents no new question, they concede that the judgment in the former suit, though rendered on demurrer, may be a bar to the second suit, but they maintain that it can never be so regarded, unless all those conditions concur.

Secondly. They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties, for the same cause of action, except as to the precise point or points actually litigated and determined in the antecedent trial; and they insist that none of the defenses

set up in their several special pleas were directly presented and determined in either of the former suits, as supposed by the plaintiffs.

The identity of the parties in the former suits, with the parties in the suit at bar, is beyond question, and it cannot be successfully denied that the cause of action, in the former suits, was the same as that in the pending action, within the meaning of that requirement, as defined by decided cases of the highest authority.

Where the parties are the same the legal effect of the former judgment as a bar is not impaired, because the subject matter of the second suit is different, provided the second suit involves the *same title*, and depends upon the same question. Second suit for trespass was held, in case of Outram vs. Morewood (3 East., 346), to be barred by the record of a former judgment between the same parties, recovered long before the second trespass was committed, as it appears that the same *title* was involved in both cases. Precisely the same rule was also laid down in the case of Burt vs. Sternburgh (4 Cowen, 559), and the reason assigned in its support was, that the plaintiffs' right of recovery and the defense set up in the second action depended on the same *title* as that involved in the former suit. So, where an importer and two sureties executed two bonds for duties, and the principal being insolvent, one of the sureties paid the whole amount and brought suit against the other surety for contribution on the bond which first fell due, and was defeated, on a plea

of release, by the obligee, with his own consent, the judgment was held in a subsequent suit for contribution for the amount paid on the other bond, to be a conclusive bar to the second claim, it appearing that both bonds were given at the same time, upon the same consideration, and as parts of one and the same transaction.

Different bonds, it will be noticed, were described in the two declarations, but the decision of the court was placed upon the ground that the cases were precisely alike, as to the right of the plaintiff to demand, and the duty of the defendant as a co-surety, to make contribution.

Nothing is better settled, say the court, than that the judgment of a court of concurrent jurisdiction, directly upon the point made in the suit, is conclusive between the same parties, upon the same subject matter, and they referred to the case of Gardner vs. Buckbee (3 Cowen, 120), as directly in point, and there can be no doubt that it is entirely analogous.

Substance of the material facts in that case was that two notes had previously been given by the defendant for the purchase money of a vessel, which he refused to pay; and in the suit on the first note the defense was that it had been obtained by fraud, and the judgment was for the defendant; and in a subsequent suit on the other note, that judgment was held to be conclusive as to the question of fraud.

Weighed in the light of those decisions, it is quite

clear that the cause of action, in the legal sense, is the same in the case at bar as that in the respective former judgments set up in the four replications under consideration."

It is an attempt to prosecute this action upon the *same claim* and *demand* as that upon which the former action was based, that is on the obligations implied from the acceptance and compliance with ordinance 248. In Cromwell vs. County of Sac, 94 U. S., 352, the same court says:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

New Orleans vs. Citizens' Bank, 167 U. S., 371.

Southern Pacific &c., vs. U. S., 168 U. S., 1.

Brady vs. Daly, 175 U. S., 159.

Lumber Co. vs. Buchtel, 101 U. S., 638.

Case vs. Beauregard, 101 U. S., 688.

The judgment is conclusive of all the *issues raised* in the *pleadings* and the parties are precluded from litigating the same matter in a new suit.

Lord vs. Morris, 18 Cal., 482.

Caster vs. Brown, 23 Cal., 143.

Lents vs. Shear, 26 Cal., 361.

The former judgment established the status and relation of the parties concerned to the ordinance, and is *res judicata* as to them and any one succeeding to either of their interests. Section 3196, Code of Civil Procedure, reads:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States having jurisdiction to pronounce the judgment or order, is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or condition, or relation of the person."

The judgment is entitled to full faith and credit, and in Montana it is presumed to determine every fact well

pleaded, *when* rendered on the merits, which is necessary to uphold the judgment.

Kleinschmidt vs. Binzel, 14 Mont., 58.

But the statute is explicit as to what is *necessarily* adjudicated, and declares that under the record whatever is necessary to support the judgment is adjudged. This would seem to exclude anything the court might say as to issues actually tendered and the decision of which is necessary to support the judgment. It reads: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or *necessary thereto.*"

Not what was *actually* decided, but what was actually and necessarily included, or necessary to uphold the judgment. Hence under the former complaint based on the ordinance, acceptance and compliance with it, a right to injunction existed, which is the question here, and its determination was necessary to dissolve the injunction of the trial court and dismiss the bill, it is *res judicata* under the *Code.*

In Peterson vs. Weisbein, 80 Cal., 38 and 39, the court says:

"On a former appeal this cause was reversed on the ground that the defendants, who relied upon a constable's deed to establish their title, had not made out their case for the reason that they had failed to introduce in evi-

dence the judgment and execution *on which the deed was based* (Peterson vs. Weisbein, 75 Cal., 174.) On a second trial the evidence was supplied and judgment was again rendered for defendants.

The plaintiff objected to the introduction of the judgment and execution in evidence on the ground that the judgment was invalid. But it was shown by evidence that in an action between the plaintiff and the defendant's grantor, who was the purchaser at the constable's sale, it was determined by the judgment that the judgment of the justice's court and the sale under it *were valid.* This adjudication was conclusive as to the *validity* of the *judgment* (Peterson vs. Weisbein, supra). Therefore the court below did not err in it in evidence.

The judgment roll in the case between the plaintiff and the defendants' grantor was objected to on the ground that the parties in that action were not the same as in this. But the defendants having purchased from the party in the former action, the judgment inured to their benefit and was competent evidence."

And so it is, where the mortgage was taken and the purchase made under the foreclosure of it, appellants took the interest of their predecessor subject to legitimate legislation concerning the force an deffect to be given the judgment. That is to say, subject to the statute that everything necessary to support the judgment and included in the pleadings is adjudged by it. So that giving the judgment full faith and credit under the Montana

code requires that any decisions cited in conflict with it must yield to its provisions.

In Freeman on Judgments (4th Ed.), p. 460, this doctrine is stated: "So if a contract is construed, or if a party has been determined not to be entitled to its benefits, such construction or determination is conclusive in subsequent controversies," citing:

Buchanan vs. Smith, 75 Mo., 463.

Lorillard vs. Clyde, 122 N. Y., 41; 19 Am. St. Rep., 470.

Robinson vs. Fries, 22 Fla., 303.

Noys vs. Kern, 94 Ill., 521.

And on page 256 the same author says: "The principle underlying and supporting all these decisions is, that a judgment *necessarily* affirming or denying a fact is conclusive of its existence whenever it becomes a matter in issue between the same parties, or between parties in privity with them." * * * It is not necessary to the conclusiveness of the former judgment that the issue should have been taken on the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been either *expressly* or by necessary implication in issue, which must *necessarily* support the judgment or decree must be concluded." It is manifest that this is the rule adopted by the code quoted, in-

stead of requiring the matter to have been actually decided, unless it be regarded in the sense that whatever is *necessary* to support the judgment is deemed *actually* decided.

And on page 259 the same author says:

"During the trial of a cause evidence may properly be received of the existence or non-existence of facts which, though they bear upon an issue and tend to show on which side of it the truth is, are not, though conceded to exist, necessarily conclusive. It is this class of facts which the courts have usually intended to designate by the terms 'collateral,' 'incidental,' or 'not directly in issue,' and therefore as not being proved or disproved by the judgment, though controverted at the trial, and perhaps passed upon by court or jury and exercising a controlling effect over the verdict and judgment. Still, if the judgment can be correct, whether the fact in question exists or not, it is not directly in issue, and therefore does not become *res judicata*.

In determining what has been decided, and what, therefore, became a binding adjudication, the actual judgment of the court must be consulted, and so far as it speaks, must be allowed to control. Its clear import cannot be modified or controlled by the expressed opinions of the judge by whom it was pronounced, nor by the reasons urged by them in its support. In ascertaining whether a particular matter has become *res judicata*, the reasoning of the court is less to be regarded than the

judgment itself, and the premises which its existence necessarily affirms.

Henry vs. Davis, 13 W. Va., 230.

Hymes vs. Estey, 116 N. Y., 501; 15 Am. St. Rep., 421.

McKinney vs. Curtis, 60 Mich., 611.

Kid vs. Laird, 15 Cal., 161; 76 Am. Dec., 472.

Smith vs. Sherwood, 4 Conn., 276; 10 Am. Dec., 143.

Cavanaugh vs. Buehler, 120 Pa. St., 441.

Stannard vs. Hubbell, 123 N. Y., 520.

Lorance vs. Platt, 67 Miss., 183.

Hubbard vs. Flynt, 58 Miss., 266.

Houser vs. Ruffner, 18 W. Va., 244.

Gilbert vs. Thompson, 9 Cush., 348.

Doonan vs. Glynn, 28 W. Va., 715.

Beckwith vs. Thompson, 18 W. Va., 103.

Wood vs. Jackson, 8 Wend., 9; 22 Am. Dec., 603.

Lentz vs. Wallace, 17 Pa. St., 412; 55 Am. Dec., 569.

McDonough's Succession, 24 La. Ann., 34.

Plicque vs. Perret, 19 La., 318.

Hill vs. Bowman, 14 La., 445.

Buckner vs. Calcote, 6 Cushman, 432."

Herman on Estoppel and Res Judicata, in accord with this rule, declared by the Statute, Vol. 1, page 270, says:

"First: The maxim: *'Interest republicae ut sit finis litium,'* has never yet been questioned; and Second: Whenever a matter is adjudicated, such judgment decides every matter which pertains to that cause of action or the defense set up, or which is *involved in the measure of relief to which the cause of action or defense entitles the party,* even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it. This principle prevails throughout the civilized world, with but few exceptions, and includes not only what actually was determined, but also extends to every other matter which *under the issues* the parties *might* have litigated in the case."

And on pages 274 and 280 the same author says:

"In a judicial proceeding in a court of record, where a party is called upon to make good his cause of action or establish his defense, he must do so by all the proper means within his control, and if he fails in that respect, *purposely* or *negligently,* he will not afterwards be permitted to deny the correctness of the determination nor to relitigate the same matters between the same parties. If a party having a defense which he might make, omits to do so, he waives it. If a party fails to plead a fact he

might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity, the law will not aid him."

"An estoppel created by a judgment is not limited to facts admitted or proved. Judgments turning exclusively upon questions of law are equally conclusive. It is the judgment itself, whatever may be its form, and without any regard to the nature of the question in controversy, that creates the estoppel, and when the same question is at issue between the parties in two successive actions, a judgment rendered for the defendant in the first is an absolute bar to a recovery in the second, although the evidence in the second, had it been given in the first, would have entitled the plaintiff to recover, and although the subject matter of the subsequent suit is different from the first, where it depends upon the *same question*, it is equally conclusive."

It was claimed that the bill in this suit was multifarious, because two causes of action were united, *i. e.*, one as a taxpayer and the other under its title as on account of the ordinance and rider. This was overruled. The same conditions exist under the averments of the complaint in the former action. But it has never been insisted and could not be, with any degree of propriety, that the assertion of a title under the ordinance and rider constituted in the former or in this suit two *causes* of action. They are simply muniments of title in establishing the cause

of action, *i. e.*, the unlawful attempt of the city to put in a plant of its own, and to authorize the injunction, the sole object of both actions.

The authorities seem to uniformly hold that if the facts alleged constitute but one cause of action, it cannot be split up and part tried at one time and the balance at another time, as is the case here. The plaintiff might have announced, as it did announce, that it had another title and right besides the rider that entitled it to the injunction, but did not propose to try it now, and will bring on another action, comprising the same cause and seeking the same relief. It may take such course and influence the action of the court, but it cannot thereby escape the binding force of the judgment under the judgment roll. Especially would this be true as in both the former action and in this suit, these two elements of title are set up, either or both of which may or may not support the cause and object of the action.

But why rely solely upon the decision, when the statute, the law upon every subject upon which it legislates, emphatically declares the effect of the judgment and the mode of escaping it. If the dismissal is on the merits it is *res judicata* between the parties and privies as to all the issues tendered under the judgment roll. Section 1004, Code of Civil Procedure, reads:

"An action may be dismissed or a judgment or nonsuit entered in the following cases:

1. By the plaintiff himself, at any time before trial,

upon payment of costs; provided a counter claim has not been made or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court when upon the trial and before the submission of the case the plaintiff abandons it.

5. By the court, upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury.

6. By the court when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.

7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceeding shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year and served and return made within three years after the commencement of said action, or unless appearance has been made by

the defendant, or defendants, therein within said three years.

The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register."

Section 1005 reads: "In every case, other than those mentioned in the last section, judgment must be rendered on the merits."

Section 1007 reads: "A final judgment, dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits."

Under these statutes, the judgment is emphatically one upon the *merits* and is conclusive between the parties and those in privity with them whatever may have been or be, the rule in the absence of them. It appears from the judgment roll that it was not rendered under Section 1001; that it was another case than those mentioned therein, and emphatically under Section 1007 prevents the maintenance of another action. The result of all this is, that under the statute, which must control, the former judgment is conclusive between the parties and those in privity with them. It assumes that every fact and comment of title placed, is conceded and yet no cause of action exists. It has the force and effect of a judgment upon demurrer, does not come under any of the grounds enumerated in Section 1004 and must consequently be a judgment upon the merits, under the mode presented for

ascertaining that fact, emphatically declared and presented by the statute. There does not seem to be room for doubt but that appellant is a privy to the former judgment and consequently bound by it.

The facts disclosed by the record show that the ordinance was in force and unchanged, at the time the mortgage referred to was executed, and that to the extent of the interest acquired in the franchise or license under ordinance 248, the mortgage was a privy as successor to one of the parties to the contract. This privity once attaching adheres to the transaction, and follows the title of each successor. The purchase under the mortgage was made, not pending the former suit, but after the judgment in it. So that under it appellant was likewise not only a privy but a purchaser at a judicial sale who steps into the shoes of the judgment debtor mortgagor and judgment creditor and privy mortgagee. Hence, all involved are privies and the rule as to the binding force of the judgment under the statute, to give it full faith and credit obtains. The case is consequently unlike one when a third party not a privy enters the field of litigation. In such case all the parties who are privies as between themselves, are entitled to be heard and a hearing as to one, would not of course be an estoppel as to the other. To illustrate: Under the laws of this State one receiving personal injuries by the negligence of a railroad, is entitled to precedence under any judgment he may recover as against a prior mortgagee. If an action is brought and

judgment recovered under such circumstances, both the railroad and *perhaps* the mortgagee are entitled to be heard and a recovery against one would not be an estoppel as to the other.

But on the other hand suppose the contention was one between the grantee of the franchise and the grantor, involving the naked legal question as to the status, *i. e.*, legal relation of the parties. In such case all the parties and privies are before the court, *i. e.*, the grantor of the franchise, the grantee and the mortgagee because he is a privy in estate to the grantee in the franchise. There is no third party involved and only the parties to the franchise and privies are to be found by the judgment. Hence, in the case we have used for illustration, it could only be analogous to the one in hand if the question there involved as it does here, a construction of the franchise, to the result of which the mortgagee had subjected himself as a privy, after the franchise was in esse. There are many reasons why this should be so, as it involves purely a legal question, leaving no room for collusion, fraud or injustice.

IV.

OBJECTION TO DECREE, AND REQUEST TO MODIFY.

It will be observed from the record, page 130, that the City of Helena objected to the decree and also requested a modification of the same upon the grounds that

it was too broad in its scope even though appellant was entitled to the relief asked for under Ordinance 248.

It also will be observed that the decretal order runs solely against the city bringing in water to supply its inhabitants and that the city is permitted to construct a plant for sewerage, fire and other municipal purposes.

It also appears from the record that the City of Helena is now proceeding to construct a plant for the purposes of supplying it with water for municipal purposes and for the inhabitants of the city.

It would seem to follow that in the exercise of ordinary judgment that it would be the policy of the city to construct its plant with sufficient capacity to furnish and supply the city for municipal purposes and its inhabitants, as a business proposition.

It would further seem that all that could be asked under such circumstances would be an injunction restraining the city from entering into competition with appellant in the sale and distribution of water to the inhabitants, and that the decree should be limited to that particular matter. That is to say: That if the city deemed it feasible and proper, in the exercise of its discretion and business functions, to bring in a sufficient quantity of water, with a view to supplying itself for municipal purposes, and also the inhabitants of the city, it should not be enjoined from doing so, and that the injunction should be limited as requested, to the sale and distribution of water to the inhabitants.

The trial judge announced, in ruling upon this matter, that he was inclined to follow the Joplin case, reported in 113 Fed., 817. But it will be noted that no such conditions existed as to require of the court a consideration of the questions presented by the bill of exceptions mentioned. There the franchise extended for twenty years, and there was no occasion for the city to put in its plant at that time, as there is here.

And it will be also noted that the Court in the Joplin case, on page 823, uses this language: "It must be kept in mind that what is complained of is that the city is about going into the business of furnishing commercial lights inside of the city limits." The effect of doing that is the question and only question in this case.

So we respectfully submit that if the court shall be of the opinion that the public right of the city to bring in a plant of its own to supply itself and its inhabitants with water has been ceded away, this decree, nevertheless, should be so modified as to permit it to construct and operate its plant, except in so far as furnishing and supplying the inhabitants of the city is concerned. See also upon the questions generally involved, 20 Enc. Law, 2nd Ed., 866, citing many cases.

Thomas vs. City of Grand Junction, 56 Pac., 665.

Hughes vs. Borough of Parnassus, 23 Pa., 196.

V.

PLEA TO JURISDICTION.

Prior to the date (April 12th, 1901) upon which appellant filed its bill of complaint herein for an injunction, the City of Helena, appellee, had commenced a condemnation suit in the District Court of Lewis and Clarke County, State of Montana, for the purpose of acquiring, by proceedings in eminent domain, the right to the use of three hundred and fifty (350) inches of the waters of McClellan Creek, for the purpose of supplying the City of Helena and its inhabitants with water. At the time of filing its bill of complaint in the suit at bar ,appellant averred in its bill of complaint (Paragraph 20, Tr., 10, and admitted in the Agreed Statement of Facts, Tr., 83), that said condemnation suit was then "pending and undetermined." To this the appellee city interposed its plea to the jurisdiction (Tr., 49), averring that on the ..th day of October, 1900, said condemnation suit above described had been commenced, and further set forth that a second condemnation suit had been commenced on the . . . day of February, 1901, in the District Court of the Fifth Judicial District of the State of Montana, in and for Jefferson County, each of which said actions was then pending and undetermined (Tr., 50).

Said plea to the jurisdiction also averred that another suit had, prior to the filing of the bill herein, been commenced in the District Court of the First Judicial

District of the State of Montana, in and for Lewis and Clarke County, by said Helena Water Works Company, complainant below and appellant herein, against said City of Helena, for the purpose of obtaining a temporary injunction enjoining and restraining said City of Helena from allowing or ordering paid any claims or demands for material furnished or services rendered said city during the time that it had been or will be indebted in excess of three (3) per cent of the value of the taxable property as ascertained by the last assessment for state and county taxes, except the claims and demands of said Helena Water Works Company for water furnished said city (Tr., 51-52).

Said plea to the jurisdiction also averred that on or about the .... day of March, 1900, Harry B. Palmer commenced an action in said District Court of Lewis and Clarke County, against the City of Helena, for the purpose of enjoining said city from auditing, allowing, or ordering paid any claim or demand against said city on account of any indebtedness incurred at any time when the indebtedness of said city exceeded three (3) per cent, its constitutional limit (Tr., 52); the plea further averring that said action was then pending and undetermined.

The plea was overruled in toto by the court (Tr., 82), and is herein assigned as error (Tr., 252).

The *gravamen* of the suit at bar is to restrain "the city from acquiring a water supply and system, unless it acquire that of appellant," and thus prevent the city

from further proceedings at law in the condemnation cases earlier instituted and in progress in the state courts.

The injunction as issued, restraining as it does the further prosecution of said condemnation cases in the state courts commenced prior to the suit at bar and over which said state courts had already theretofore acquired jurisdiction, is in direct violation of the plain terms of the United States statute in reference thereto, viz: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

U. S. Rev. Statutes, Sec. 720, page 137, 2nd Ed., 1878, and notations thereto.

Dial vs. Reynolds, 96 U. S., 340, L. Ed., 644.

Rose's Notes to U. S. Reports, Vol. 9, page 438.

Diggs vs. Walcott, 4 Cranch, 179.

Peck vs. Jenness, 7 How., 612.

Watson vs. Jones, 13 Wall., 679.

Haines vs. Carpenter, 91 U. S., 254.

Ex parte Chetwood, 165 U. S., 443.

Dillon vs. Kansas City Ry. Co., 43 Fed., 109.

The last cited case, *Dillon vs. Kansas City S. B. Ry.*

C., 43 Fed. R., 109, is directly in point. An injunction was sought in the Federal Court to restrain an entry upon the land sought to be condemned in a State Court, but was refused under the provisions of Section 720, U. S. Rev. St.

From the opinion in Mills vs. Provident Life & Trust Co., 100 Fed., 344 (Circuit Court App., 9th Circuit), we quote the following:

"It is apparent, we think, that the action was one for injunctive relief, not as an incident to an existing cause in equity, but as the primary object of the action." (The complainant in this suit like the complainant and appellant here was not a party to the action in the state court.) In answer to this position the Court, after approving of the liberal construction given to said Section 720 by the Court of Appeals of the Sixth Circuit, goes on to say:

"There is nothing in the language of Section 720 of the Revised Statutes, nor in the reason for that enactment limiting its provisions to parties and privies to the proceedings in the state court but the prohibition is *general* and denies to every federal court the right to stay by injunction, at the suit of *any person*, proceedings in any court of a state, with an exception within which the present case does not come. We are of opinion that the court below was without jurisdiction."

See also—

Sharon vs. Terry, 36 Fed., 365.

Eureka & K. R. R. Co. vs. California & N. Ry. Co., 103 Fed., 897 (9th Circuit).

Coeur d'Alene Ry. & Nav. Co. vs. Spalding, 93 Fed., 280 (9th Circuit).

Aultman & Taylor Co. vs. Brumfield, 102 Fed., 7.

VI.

THE BILL IS MULTIFARIOUS.

There is combined in the bill of complaint in this case two distinct and separate causes of suit, either of which entitles the complainant, according to its theory, to the relief demanded. While there are many cases decided in which different causes of multifariousness exist, the authorities seem to concur, that defendant cannot be called upon to defend two separate and distinct causes of suit where the same results could be attained by one. The true and correct test as to multifariousness in *this particular* is, whether two separate causes of suit are united in one bill of complaint, and is not in *such case* limited to the fact that each cause may entitle the complainant to the same relief. One *cause of suit* is based upon the rider and alleged contract which is sought to be specifically enforced by injunction, and the *other* is based upon the rights of a taxpayer, growing out of a *tortious*

diversion of the revenues of the city. It is impossible under legal or equitable jurisprudence to conceive of the union of these two, without violating the rule at law concerning the misjoinder of actions ,and the practice in equity in respect to multifariousness. In the former cause of suit, only evidence of the contract and rider are admissible, while in the latter, the rights as a taxpayer and wrongful diversion of the revenue is only admissible. Hence it is, the bill contains two separate causes of suit, requiring entirely different evidence to support them, one based upon contract, and the other sounding in tort. All well considered cases forbid this, and declare the bill in such case to be multifarious. Defendant should not be required to show cause until an election is had by complainant, at least, as to which cause of suit it will adopt. Besides, complainant suing for relief as a taxpayer, sues in that capacity for all others similarly situated, who are alike affected by the injunction and have no interest in the ordinance contract.

Church et al. vs. Citizens &c., 78 Fed., 526, 529.

Brown vs. Guaranty Trust &c., 128 U. S., 403, 412.

First Nat'l Bank vs. Peavey, 75 Fed., 154.
Leslie vs. Leslie, 84 Fed., 70.

Reynolds vs. Reynolds, 71 Cal., 183; 9 Pac., 179.

Hollow vs. Wallace, 66 Fed., 318.

Bliss, Code Pleading (2nd Ed.), Sec. 289.

15 A. & E. Encyc. of L., 947.

14 Encyc. of P. & E., 197.

Respectfully submitted,

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